E COURT OF THE UNITED STATES

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MANUEL VACA, ET AL, PETITIONERS, for any and any

NILES SIPES, ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

INDEX Januall.

Record from the Circuit Court of Jackson County,	Original	Print
Missouri, at Kansas City	4	466
Petition for damages (as amended)		24.6
Defendants' first amended answer	2	1
Reply to first amended answer	7	5
Transcript of trial	10	7.
Appearances	10	3 87
Testimony of Guy Campbell	10	. 7
direct to tiber		
	11	7
Benjamin Owens, Jr.		
direct 2993(Det	21	10
Oct of the Control of	68	36
GI redirect position	125	72
Carlot Name of Carlot American Company (Carlot Carlot Carl	129	75
redirect and to the Aller of th	189	77
di Plaintiff rests	140	. 78
	147	82
Defendants' motion for a directed verdict and	330	161
Overtuning thereon	148	82
and the property of the party o	a treet a boilt	16 36 CM

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 12, 1966

Frankline is simply provinced by			1	
INITED STATES	STATE OF THE PROPERTY OF THE P	equerns,	Original	Print
Record from the Circuit	t Court of Ja	ckson County,		
Missouri, at Kansas		led		
Transcript of trial-		/ · · · ·	N.	
Testimony of Leon		son—		
	direct		149	84
EPHINOTHES.	cross .	**************************************	164	95
	redirect		172	98
	recross		176	101
WTATES BITT Cale	Mooney-	KIMUL. 24	HIS NO	INI
DECEMBER.	direct	O MIMAGE	177	102
1	redirect		189	113
	POTENTIAL CONTRACTOR OF THE PARTY OF THE PAR		197	117
is court of wiredist.	recross	OF BARBURNES	200 203 /	117
	recross		204	118
Many	iel Vaca	6	204	. 119
	direct		205	. 120
tall fundbo	cross		214	127
7,1100.7	redirect	nn y transist qu	219	131
	recross	Allia CLARILL	222	138
Erne	st F. Kobett-	Her Landston	Sto W.	
7" - 111	direct	omphales avel	222	133
• 7	cross		233	141
01	redirect	1	288	145
	recross		239	146
	redirect	1111	241	147
	redross	AUTURN THE T	242	148
101 12 10	redirect		242	148
08 - 40	recross S	0.13	243	149
125 _ 72	redirect	in it	244	150
Defendants rest	Maria de Maria Balla	BB1	245	151
Testimony of Benja	min Owens,	5 .7		
in the tree	buttal)—	1991		*
and the same and the same and the	direct	· · · · · · · · · · · · · · · · · · ·		151
Evidence closed	Well twiller	ANT CONTRACT	249	.154
Defendants' motion	Con discourse	The fact of the	256	158
close of evidence	overraled	verdict at	650	Sellemone .
. DOOL MI TAINGA	A ZHOX WHY	* TRINFFEES.	256	158

		A		1100
district Links			Original 1	
Record from th	e Circuit Court	of Jackson Com	thought many him	CF
Missouri, at 1	Cansas City-O	optinued		400
Transcript of	trial Continu	ed in make of	CONTRACTOR	14.
Record in	Chambers in	e objections to	menter s minute	.1
Struction	Annaire of the Ca	a onlections to	m- jetter!—Of	
781 Countle ine	motions or l	grid and Which	personal property	159
Verdiet.	tractions and of	pjections thereto	arqa8 1267kb	159
Indones	A Hell to A Hor	Mary Server R EN	11- 382 tter fro	165
Motion of d	mtry trant	M red hiero Z. h.	1302 na, dil	165
091 moriou of d	elendants for j	udgment in seco	efendants Ibr	ď
ance with	metr motion fo	r a directed word	intermedia 71	40
del med at th	ie closs of all e	vidence, and in	the Capacian	
atternativ	e, a motion for	a new trial	45 mut 960 01	166
Order overrui	ing defendants	alternative moti	to Leonano	•
TOL'S DEM L	PIRI	The state of the same of the s		171
Notice of appe	al to Kansas Cit	y Court of Appe	Ja 979 01	171
CONTRACTOR AND ADDRESS OF THE PARTY OF THE P	TINIO -	Pin	ELL PROPERTY	172
1-Letters f	rom Dre John	M. Gill (1)	and continued to	LIZ.
RAL CaW. Ale	exander (2), de	ited July 6, 196	0.000	
May 19, 1	960 and July 8	1960 500 101	Assistant TO	14
oer 2 Swift &	Company M	aster Agreeme		72
with Natio	bal Brotherhoo	d of Packinghou	manday day	dis :
Workera. (overing Period	September 1, 190	M. PANIJASSA	H.
to Septem	ber 1 1961 /av	cerpts)	Southain Indian	qu
3-Letters f	om Day H. H.	Gerpia)	Territ 5.13 in 18-15	78
P. McDon	ald stated Man	Hesser and Bru	des automation and	aO
May 18, 1		ch 24, 1960 an		
4-Tetter fro	m Allen B D	ALEX PROPERTY.	292 1	78
Kohett de	in senso un ou	wie to Ernest I	de paolaigo peti	9.10
The state of the s	AND GENTRAL OF	Paragraphy States of	to the condensation	79
A TACKET TEA	m Auan R. Bro	Whe to Ernest I	a market	
Toner' OF	red Thesempon 1	4, 1960 same s	i ni 294 ibaa 1	30
- THEORET IL	om Ernest F	Kobett to Alle	n toronom	re l
og prowne, de	ited November	26, 1960 perioli	200 80295 doing	6) .
TOTAL IL	III AHRBONES ROOK	POTENCE AND AND DE		100
ALTI- DITHE	L. L. Dobett	dated Novembe	Theresistation a stern	Do.
25, 1960 c	draw tot well	ted all obesit	296 - 18	d)
THE REPORT OF STREET, A STREET, AND ADDRESS OF THE STREET, AND ADDRESS OF T	CONTRACTOR OF THE PARTY OF THE	owne to NBPW	17670174	*
G GREAT MOAG	mber 3, 1960	a ser market been		3
9 Letter fro	m Allan R. Br	owne to NBPW	arecrarie poise	
dated Octol	oer 24, 1960 _	de la	tothermord o	if .
D)	THE PER MINE	Sam Division fo	11 1498 1 -18	2
STATE OF THE PARTY	STATE OF THE STATE		THE STATE OF THE S	CONTRACT.

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Record from the Circuit Court of Jackson County, di mod Jackson
Missionri, at Kansas City Continued 111 annual 12 12000114
Plaintiff's Exhibits Continued Printing 1 - Live to represent F.
10 Letter from Allan Bi Browne to Inde at the conti
pendent Packing House Workers Union Strike
TO CARGO CHICAGO CONTRACTOR CONTR
299,0 184
Browne dated November 10, 1980
195
Defendants' Erhibits 186
17—Minutes of Second Step Meeting held in the same line
Kansas City, Missouri, August 18, 1960 301 186
to Leonard James of Bullet W. Day
to Leonard Jamerson, dated February 6
10 /95 187.
gust 81, 1960
90 October 100
7 10g0 1 600 t 6 11 t 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
91 100
· Nantambar 9. 1980)
Proceedings in the Manual Clark
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Detter opinion, dated June 7 1965 hydrogathan and
pellant's motions and transferring case on own
Proceedings in the Supreme Court at Mississet
Judgment worth total Harris Cont Cont
Opinion on bane. Holman of the same same
Respondents' motion for rehearing oversaled
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CETHORAPI
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dated Outober 21, 1960

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Little I badie Bangaria Owens, Ja., Plaintiff als shirt out the distance received and best and very significant and an analytic or of the distance of the

MANUEL VACA, CALBE MOONEY, and ERNEST F. KOBETT, Defendants. to a contract believen said Masional Bratherhood of Puckilik

J. Donald Murphy, Judge, Division No. Eleven.

PRITION FOR DAMAGES Filed February 13, 1962 (as amended) Terest huse for book sho

members of said Name 1. Plaintiff states that each of the Defendants, at all times herein mentioned occupied the positions and the status mentioned above, which is incorporated herein; that the National Brotherhood of Packing House Workers is a voluntary Association and labor union; that each of the Defendants is a class representative of the organizations named above, and the above parties are class representatives of the above voluntary associations and all are members of the above associations which are voluntary associations and labor unions; that the local branch of said National Brotherhood of Packing House Workers is known as Kaneas City Local #12; that the members of said labor unions constitute a class and are very numerous, and that it is impractical to bring them all before the Court; and that the above parties are the only parties known to Plaintiff upon whom service may be had in the State of Missouri; that service upon said Defendants will fairly insure ade quate representation of all, and on behalf of all in said union, who are and may be sued; that this is a class action igainst the membership of said National Brotherhood of Packing House Workers and said Kansas City Local #12

its local branch; that this action is several and there is a common question of law and facts affecting the several: rights of the members of said unions and a common relief. [fol. 3] is sought; that said Defendants are the representatives of the local and National membership of all of the union members as to matters occurring in this area, and have been fairly chosen and adequately and fairly represent the whole class as representatives of the class; that Plaintiff is unable to name any other members of said unions upon whom service may be had in this State; that at all times herein mentioned, said union membership and members were acting through their agents, servants and employees in the scope of their employment; that pursuant to a contract between said National Brotherhood of Packing House Workers and Swift & Company, the employer of Plaintiff, covering the period from September 1, 1959 to September 1, 1961, said National Brotherhood of Packing House Workers was designated as the agent for Plaintiff, member of said National Brotherhood and of said Local #12 in matters connected with Plaintiff's employment with said Swift & Company, in Kansas City, Kansas, and particularly in connection with handling of grievances of Plaintiff against said Swift & Company, under Section XIII of said contract; that Defendants have copy of said master agreement, and are acquainted with the provisions thereof: that said master agreement provided that if an employee. including Plaintiff, and the employer had differences or any local trouble incident to the employment relation; the differences would be handled through the grievance procedure provided in said master agreement, which included [fol 4] five steps; that the agreement further provided that if the difference was not settled by the fourth step, then the National Union Defendant herein, may refer the grievance to a named arbitrator for arbitration.

2. For cause of action against Defendants, Plaintiff states that he had a difference with his employer, Swift & Company, under the terms of said master agreement, in that said contract provides in Section III for seniority to employees after an employee has accumulated forty days

of service; that an employee shall have plant seniority after one year's accumulated service; that Plaintiff had fulfilled such requirements for seniority; that said contract further provided that lay offs from a department occasioned by gang reductions would be made according to department seniority, and that an employee having plant seniority who is removed from his department by gang reduction shall have the right to displace the junior employee in the plant provided he is qualified to perform such job, or can learn it within a reasonable time, or that such person with seniority shall have the right to displace a junior employee is the plant who is performing a job paying the unskilled labor rate; that in the event that it becomes necessary to increase the working force in the original department of such person with seniority, he shall be recalled to his original department according to the department seniority; that if said person with seniority elects to go off the pay rell, [fol. 5] he has the right to be recalled when gangs are increased by calling back employees, according to his seniority; that said contract further provided that if an employee is suspended, laid off out of turn, or discharged without proper cause, he will be returned to his former position and paid for all time lost; that Plaintiff complied with all the provisions of said contract, exhausted all remedies therein permitted him, but that employer breached said contract by wrongfully suspending him, laying him off out of turn, refusing to call him back according to his established seniority as provided in said contract, and wrongfully refused to continue his employment by falsely and wrongfully asserting that he was not physically fit to hold the job; that Pleintiff was physically fit to hold the job, and requested that he be restored to the job, in accordance with said contract, and permitted to work from January 8, 1960 on; that employer failed and refused so to restore him to work, and breached said contract as herein provided; that Plaintiff was earning and was entitled to earn on said job and in said employment the sum of Six Thousand, Five Hundred (\$6,500.00) Dollars per year, plus such increases as were agreed upon from time to time; that, as a direct result of said wrongful breach of said contract, by employer, and of said wrongful refusal by employer to permit Plaintiff to continue to work, Plaintiff was damaged in the sum of Six Thousand, Five Hundred (\$6,500.00) Dollars [fol. 6] per year, continuing until the date of trial, or, until employer permits Plaintiff again to work under said contract.

3. Plaintiff further states that he requested the Defendants to carry the differences and grievances against the employer through all necessary steps provided by said master agreement, but the Defendants arbitrarily, capriciously and without just or reasonable reason or cause, by refusing without just grounds to pursue further the just claim of Plaintiff, and by demanding, without legal basis, the \$300.00 to continue, all as herein stated, refused to carry his grievances through the fifth step, arbitrarily, wrongfully, capriciously, wantonly and with legal malice, as aforesaid, demanding approximately. Three Hundred (\$300.00) Dollars from him before taking said step, and refusing to take said step; that thereby said Defendants acted wrongfully, illegally, wantonly, arbitrarily and with legal malice, as aforesaid, preventing Plaintiff from completely exhausting administrative remedies permitted in said master agreement, causing him actual damage in the sum of Six Thousand Five Hundred (\$6,500.00) Dollars per year from the above date of January 8, 1960 and continuing until the date of trial, and he is further entitled to punitive damages in the sum of Three Thousand (\$3,000.00) Dollars; that Defendants, as a voluntary association and labor union and an association of large means are amply able to respond [fol 7] in punitive damages; that Plaintiff has requested that Defendants pursue his grievances under said master agreement but that Defendants have failed and refused to do so, following the fourth step. 1960 on; that organization

Whenesons, Plaintiff prays judgment against Defendants in the sum of Seven Thousand (\$7,000.00) Dollars, actual damages and Three Thousand (\$3,000.00) Dollars, punitive damages, and for his costs.

James here derived the said of each most need being every en-

SHOTE IN CHOURT COURT OF JACKSON COUNTY, MISSOURIS SIL

DEPENDANTS' FIRST ANENDED ANSWEE Filed June 5, 1964

Come now the defendants, and each of them, with leave of court first obtained, and make the following first amended answer to plaintiff's first amended petition:

- 1. That said petition has failed to state facts or a cause of action upon which relief may be granted.
- 2. That for further answer and defense, that said petition fails to state facts or a cause of action upon which relief may be granted for the reason that there is a lack of jurisdiction of this court over the subject matter of the alleged cause of action pending because the gravamen of plaintiff's first amended petition is arguably and basically an alleged unfair labor practice under the Labor Mahagement Relations Act, as amended, 29 U.S.C., Section 151, [fol. 8] et seq., and especially 29 U.S.C., Section 158, (b) (1) (A), and that as a direct consequence thereof the jurisdiction of the courts of this over the subject matter of this cause is pre-empted and-prohibited, and that the exclusive, primary jurisdiction over this cause is properly vested in the National Labor Relations Board.
- 3. That for further answer and defense, that said petition fails to state facts or a cause of action upon which relief can be granted, for the reasons that there is no sufficient allegation, averment, or showing that the defendants were under any duty to further prosecute the grievance of plaintiff, and that there is no sufficient allegation, averment, or showing that defendants exercised bad faith in refusing to so process the grievance.
- 4. That for further answer and defense, that plaintiff's first amended petition for damages on its face clearly shows that the alleged wrongful action on the part of the defendants herein arose on January 8, 1960, and that plaintiff's first petition was filed on February 13, 1962, which was more than two years subsequent, and as a consequence thereof is barred by the two year statute of limitations of

the State of Kansas, wherein this cause of action arose, under the provisions of Kansas G. S. 1949, 60-306, 3rd clause.

5. That for further answer and defense that the grievance procedure referred to in plaintiff's first amended [fol. 9] petition is that established by the Section XIII, of the Master Agreement between the employer (Swift and Company) and the union (National Brotherhood of Packing House Workers), which covered the period of September 1, 1959, to September 1, 1961; that under the aforesaid agreement that grievance proceedings in accordance with said agreement were commenced and that the fourth step of said procedure was initiated on November 16, 1960, and thereafter completed on May 9, 1964; that under said grievance procedure that there is a fifth step to be completed in the handling of grievances, namely the referral of said grievance by the union to a named individual as arbitrator; plaintiff herein refuses to proceed any further with the same; and that as a consequence thereof that plaintiff has failed to exhaust his internal and contractual remedies and that this suit is therefore prohibited and barred and that this court does not have jurisdiction over the subject matter of the alleged cause of action herein.

6. That defendants, and each of them, generally and specifically deny each and every allegation, averment and statement contained in paragraphs 1, 2, and 3, of plaintiff's first amended petition herein.

Wherefore, defendants, and each of them, having fully answered pray that judgment be entered in favor of them and that they be discharged; that they recover their costs of suit herein incurred and expended; and for all other such [fol. 10] relief as the court may deem meet and proper in the premises.

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thereof is harred by the two year statute of limitations of

AVAN IN CIRCUIT COURT OF JACKSON COURTY, MISSOURI O

been acquainted with Benjamin or Beimy Owens during REPLY TO FIRST AMENDED ANSWES Filed June 10, 1964

Comes now Plaintiff and for Reply to Defendants' First Amended Answer, denies such allegation therein not admitted or averred in Plaintiff's Petition.

IN CURCUIT COURT OF JACKSON COUNTY, MISSOURI

TRANSCRIPT OF TRIAL-June 18, 1964

This cause came on for trial before the Honorable J. Donald Murphy, Judge of Division No. Eleven of the Circuit Court of Jackson County, Missouri, at Kansas City, and a jury.

do you remendoward Ne singe that time? ...

The Plaintiff was present in person and represented by counsel, Mr. Allan R. Browne.

The Defendants were represented by counsel, Mr. Henry A Panethiere dr. bestier bad gove Saidyas II. ted W tion as to whether or not lie was a strong manuor otherwise

As Well-I noticed that he one; we built a garage, if [foldi] too if git Planting's Evidence of the hier a square

did all the work

and everything that felt in.

Os. The digging f

GUY CAMPBELL was duly sworn.

Direct examination. and a man frib terison tail A

of the wW By Mr. Browne word after to de train tade bath Q

Q. Give your name and address.

A. My name is Guy Campbell. I live at 632 Georgia, Kansas City, Kansas.

Q. What line of business or occupation do you follow! A. I'm a cement finisher and I do small contract work, [fol. 12] sidewalks, garages, and things like that, but I don't keep steady all time.

Q. You do it for yourself, do you?

A. Yes.

Q. I will ask you if you are acquainted with and have been acquainted with Benjamin or Benny Owens during the last number of years?

A. Yes, sir. He was my next door neighbor when they lived in Armourdale before the flood.

Q. Before Armourdale was flooded out!

A. Yes, sir.

Q. About how many years have you known Benny Owens?

A. Oh, about twenty years.

Q. Now, let me ask you if you recall then the time that he worked, the years that he worked down at Swift's?

A. I do.

Q. And then do you remember about January, February, around in there, of 1960 when he was off for a while from Swift's ten d'an action de cappete number le

A. I do.

Q. Then do you remember the time since that time!

A. I do.

[fol. 13] By Mr. Browne:

Q. What, if hything, you had noticed about his condition as to whether or not he was a strong man or otherwise?

Paragraph of white present the person and the

Market a will du

leon't lie whalus could

Complete from a man and addressed to

Q. You do it for yourself, do you?

A. Well, I noticed that he once we built a garage, it came a rain and it caved in and we had to dig it out, and he did all the work.

Q. What kind of work was it?

A. Dirt moving, dirt and stone—I mean blocks and rock and everything that fell in.

Q. And what kind of earth moving did he do? Was it by

hand or by machinery!

A. By hand. By hand.

Q. With what kind of an instrument!

A. Shovels and picks. That's what he did. He did all the excavating. Excepting land of I and limited the control of I. A. I'm Exception of I are supported in the control of I. A. I'm I are supported in I. A. I'm I are supported in the control of I. A. I'm I are suppo

A. Yes, sir.

Q. The digging!

A Yes sir algow ad amit all aniuh duna I bak Q

Q. What did he do? Just tell the jury. You were there

and they weren't.

A He mixed mortar for me and he brought all the materials to me and I laid the blocks but he did all of the excavating and like that industriance in [fol. 14] Q. Was this just tell whether or not this was

light work or heavy work now and small out farawe

A. It's heavy work. That's as heavy as you get on construction. he lived on Nebraska Street and I

Q. How many hours on the average would he be working doing that work and other work that you have seen him do, and I am referring to heavy work.

A. Nine and ten hours, sometimes he worked twelve

was quidling the bole and the

hours.

Mr. Browne: Blad gash that Tiblok of to trab A .9

A. Yes.

Q. Just state to the jury what you observed as to whether he was able to handle that heavy work over the period that you are telling about.

A. He was able so far as I was concerned. He did a

normal day's work as any average man would.

Q. Now during all of this period since the times that we have mentioned in 1960 up to the present time what have you observed about what Benny Owens does in the way of heavy work, if anything?

A. I haven't observed any weakness or anything, he's always give me a normal day's work, you know, a day's work, a full, you know, average day's work, just like any other man; I have hired a lot of them and fired a lot of them any time they didn't work, but he's always worked out

Q. And what kind of work is the only kind of work

you used him for!

[fol. 15] A. Oh, concrete work and all and block work. I don't do too much brick, mostly heavy work.

Q. Did you know Mr. Benny—you said you knew Mr. Benny Owens before this time in January, 19601

A Yes, sin tone my at lady it tonto I violat ?

Q. And I mean during the time he worked for Swift's, did you know kim! a state tout the and bile

A. Yes, sir.

Q. What kind of work did you have you noticed, or what have you noticed about his condition during that time. and the state out the particularies of

if anything?

A. Well, he was ill at one time and in the hospital but it wasn't too long before he went to the doctor and everything. See, I followed him, I used him off and on when he lived on Nebraska Street and I remember when he was able to return to work. And after that he was a strong man, as strong as I was that the redic bus the which had agion

Q. What is your age!

A. Porty-siz.

Mr. Browne: That's all that I think of to ask you.

[fol 21] BENJAMIN OWENS, JR. was duly sworn. narell and arous

Direct examination.

By Mr. Browne: " A state and a state of the state of

Q. Your name and address !

A. Benjamin Owens, Jr., 2728 North Seventh Street, Kansas City, Kansas.

meete patillel era

He was sole in the

Q. Now, you are the plaintiff in this case, are you?

A. That's right.

Q. I will ask you if in January of 1960 you were in the employ of Swift and Company for many years before that time?

time they didn't work, but he's aimi

A. Yes, sir.

Q. How many years have you worked for them?

A. 16 years.

Q. That is up to January, 1980; whene all A. [61 161] A. Yen. Solve was the most property works and the leaves

Q. Did you know Mr. Benny-you said Vaddenta Dr

A. Yes, in the neighborhood wit stat stoled snew Council

Q Before I forget it, what is your age? How old are YOU T

A Fifty-onerd sin offen out agent mor sella wom nov Q. What kind of work did you do for Swift and Company over the years! ... they wouldn't the the transfer of

A. Well, I done all labor work for them. I was hanging chuck, beef chuck and beef loins, half of the beef, and getting the cattle out of the woods tare sermio to bak A

Q. Out of the getting the cattle out of the what!

A. Out of the cooler. at the country the sook it of Q

Q. Coolert district Franchist on Marint nesolation of these

A. We call it the woods down there. on with at mail! :Que [fol. 22] Q. All right. That's all right. I am not familiar with it no ti deng min nor after eddings and a rise and time.

A. And my job was a two-man and we have to take a whole half a cattle, whole half of cattle and we threw it from one rail to the other one, ad at handread it revends

Q. Two men would do that, or one man? All Mow. A

A. Two men, one man was handling the pole and the other man was under the beef. The blist was rentracy on

Q. Well, I feel certain the jury is familiar with the general operation so I won't go into detail about that, but this work that you did over this sixteen years time, so it won't be strung out any longer than we need to, was that light work or was it heavy work! Just describe it for the jury.

A. It was heavy work the total the fact of the first to the fact of the first total the fact of the first total the fact of th

Q. And how heavy weights would you have to lift all day

long in your work during all those years

A. All the way from, well, the half a cow deal, it run all the way from nine hundred back down to about five, five or no a half a cattle about four-fifty, that's a half a cattle. LANGER OF THE BEST STATE OF THE PARTY AND

Q. Well, of course, you yourself couldn't lift the nine hundred pounds or even four-fifty cow?

A. No, it would be two of us. when bling the barrity more

Q. Two of you could manhandle that it dotters have been

A. That's right value find had was tadt when I ablue ow

Q. Well how would you do it! What was the job! [fol. 23] A. Well we had a pole, one man had a pole with a rail up so high, just high enough where the eattle won't drag the ground, you have an idea just how high cattle is, other man hunging that beef region

you know, after you hang the cattle up by his hind legs, it would be somewhere approximately about nine feet.

over the years?

Q. In the air!

Bu A In the air ment his show took! He man I Holl

Local their old beat louis. Indie of the Heart of

- A. And, of course, just put the neck, you know, of it down about a feet from the floor. de cooler.
 - Q. So it doesn't drag!

A. So it doesn't drag.

Q. Then is it a moveable assembly line or chain or somethingful for ma I Adair lie a led'I

A. Yes, sir. It is on the rail, you can push it on the rail, carry it any place that you want to carry it.

Q. All right. Now exactly what would you or your buddy,

whoever it happened to be would help you, do to

A. Well, the cattle that they choose which they want to sell, they will tag it, they will put a tag on it. Then me and my partner, we would go through there and we would find this here tag where we would have to get this here cattle out of there, then that's where we would take our pole and work that you did over this extension album at no it tuo

be strong out any longer than we unfirst obbim od Dat

WAL That's right it was work? That work it kew to thow

Q. I get it.

A. To where we could make a switch, and we sometimes. sometimes we would handle two hundred, some days three hundred and some days it have run up as high as five the way from time but thed back dawn themen mort way the

. Arow wased saw if ./.

Q. Carcasses, you are talking about, pieces of cattle?

A. That's right.

O. Well of conject you yearself couldn'than IlA Que

A. We didn't have to lug all of these out now because sometimes we could make switches, we could make switches and we'd switch them out instead of, you know, but when we couldn't make that switch then that's when we would have to lug them out of there, that's what you call lugging

A. That's right, and the pole, one man on the pole and the other man hugging that beef.

Q. Would you let it drag on the ground it A [62 101]

A. No, sin it can't touch the ground now vellout ared sint

Q. For hygienic—they wouldn't pass inspection !

A. No. If it touched the ground, maybe fall or something like that, if the inspector would catch it, he will come along and tag it and we would have to clean it up.

Q. Now that kind of work that you have described to this

jury did you do that for all these years to an about A. A.

A. Well, I didn't, I wasn't on the same job at all times but everything they put me on it was still, you know, it runs just something along just about the same, handling heavy beef; sometimes it was cut up in quarters and sometimes it wasn't.

[fol. 25], Q. You mentioned the word chuck. What do you mean by chuck?

A. Well, we separate the chuck from the

Q. What do you mean by chuck?

A. The chuck roast comes off of the chuck.

Q. Where is that I wanted to be the supposed to bein

A. It is the neck part of the animalineds and a

.Q. The neck from an annual another meed bad I 9881.

A. It is the neck part of the animal, neck and part of the back, then it runs into the rib.

Q. Now during the time just before January, 1960, I mean just before this difficulty came up that we are about to go into, what was the work you were doing then for Swift and Company!

A. At the time, 1960, I was hanging chucks then, I wasn't

in the woods, I was hanging chucks. want to will stom on .

Q. How did that operation take place! What did you do?

A. Well, that was just a plain chuck, it was separated at that time in Your different pieces, the chuck, the rib and the loin and the hind quarter, made four different pieces out of it.

Q. And what would you do?

A. I'd rope them and I'd hang trolleys on the, we calls them trollies and learn on a learn trollies and learn on the learn trollies and learn trol

Transporter Market Turk

tons blo sair a of bevil yed; for has pault

Q. You did what, trolley-

A. Trollies.

Q. Put them on the trolley! You did what!

[fol. 26] A. Take the trolley and put them on the rail and this here trolley would roll, it would roll.

I me hygienic -they wouldn't pass unquestion I

t tourned the grown, maybe, fall or vest these

Q. Now what kind of lifting, that is involving what approximate weight was involved? How much would you have to lift!

A. A chuck would run all the way from, it run all the

way from forty to seventy-five pounds. Jabib t dis W . A.

on your own?

A No helper there, that's one man's work.

Q. During these years before January of 1960 when you did the work you have told the jury about were you able to handle the job?

A. Yes, sir, I was able to handle it, didn't have a minute's

A What do you most by conick

trouble. ·

Q. From your, the very day you were born you had some kind of difficulty, did you! What was that!

A. Yes, along about about January—about May the 23d, 1959 I had been working long hours, we would work all the

way from eight to ten broning out to trace deen edt at !

Q. No, I will get to that in a minute, but what I wanted to ask you first was about some murmur or something that you had had from birth. If you had that, tell the jury about that:

A. Yes. I am a high blood pressure patient, me and the [fol. 27] whole family, I was born with it, no help for it, no more than just have to take it easy, take care of myself, that's all. All of my folks, my mother and three brothers, two sisters, all of them died at a nice old age with high blood pressure, which I am suffering with today. The doctors found, they said that all they could find

Mr. Panethiere: Your Honor, I am going to object to any hearsay testimony.

The Court: Sustained. That is not responsive.

By Mr. Browne:

Q. Now you say that your people had had this same thing and yet they lived to a ripe old age?

d white troblev --

A. That's right.

Q. Did they work hard too!

A. They worked hard too, probably harder than I did.

Q. And in these sixteen years at least that you have told about before January, 1960, working for Swift, doing that heavy work, notwithstanding that you had this congenital or born with heart murmur, were you able to handle the job!

A. Yes, sir, and all the other jobs I ever been on.

Q. Before that time, even?

A. That's right.

Q. All right. And were you a strong person or a weak person! I mean physically were you strong or weak!

A. I was a strong person.

Q. Before January of '60 your weight got up to about what'

[fol. 28] A. At one time I went up to 230 pounds.

Q. And you are about how tall, just to get it in the record.

A. Five feet and eight inches.

Q. Right now you weigh about how much?

A. I goes to just about 180 pounds now.

Q. Did you reduce your weight on purpose? You know what I mean, by diet, pills, or something?

A. On diet, the doctor told me that was my whole trouble, he said I was too fat.

a release to co dick

Q. And did you reduce it?

A. I reduced it.

arred to the hirs?

Q. Now you started to mention in 1959, and I went back farther than that; now please tell about that situation or

whatever you started to tell the jury.

A. In 1959 about January the 23d—not—beg pardon—May the 23d, 1959, that's when I went out feeling bad, I didn't have no heart attack, I just only just felt bad, I was tired, and with the illness on top of it that just made me feel so bad and so I decided I would go out and take a rest-up, and the first thing that I done I went to the doctor, I went to Dr. Safer, Swift and Company physician.

Mr. Panethiere: Dr. who! O. Did they work hear took

A. Sefer, Phillip olderling not band bestrow yell A

Mr. Browne: Saper, maybe to heart is agent at had O about belone January, 1996, was king for Cariff Selace

By Mr. Browne; which a money the state was a

Q. Well, anyway, the company doctor!

A. That's right.

[fol. 29] Q. That was in '59. About what hours were you working then?

A. I was working from seven, from seven to three-thirty

A. I but a right

and on, just all depends how the work come.

Q. Normal hours seven a.m. to three-thirty in the afternoonf

A. That's right. That was a day's work but we worked always from twelve to thirteen to fourteen hours a day.

Q. And so with that twelve, thirteen or fourteen hours a day doing that heavy work, you began to get tired?

A. That's right.

Q. All right. Now then were you put back to work then after that?

A. No. When I went out in '59, May the 23d. and I was out until about September-

Q. Oh, that's-I see.

A. —until about September, and the doctor, he wrote me a release to go back to work.

Q. And when was that, now! September of '591'

A. If I sin't badly mistaken, I went back about, I believe it was the last of August, I disremember the date, I can go back and get it.

Q. Well, anyway, in that area, around August of '591

A. That's right. The doctor sent me back to work, said I was O.K. didn't have no beart attack I has

tor, I went to Ily Seler Sault to the sault selection and the selection to the selection to

Q. Which doctor!

was thred, and with the illeurs on A. Dr. Alexander. He's my family doctor.

C. C. W. Alexander! it thing that I december 1, 1.

A. C. W. Alexander

Many and ver they was

[fol. 30] Q. All right. And had you felt able to go back to work before this August of '59 date! and of the store O

A. Yes, I could have went back. seed to one redtied ...

Q. How did you feel the transfit be may aver all .do .Q.

A. I felt O.K. I had lost weight and I had done got my

pressure down and I was feeling line has me or seed I

Q. That's the question I wanted to ask you. At that time when you felt able to go back to work, about what did you weigh then, what had you got your weight down tol

A. He had got it down to about he got it down to about

195 pounds them har wall to the heats and at each to

Dr. Alexander, one dated July 8: 1960, and one seY .. Q

A. But I was still losing weight tab at lad thin the anot

Q. I see. Were you doing it how were you doing it? By medicine or by diet or both 1 and to table 1 and as Y : A

A. Both of them, medicine and diet, and esent tog I notech

Q. Yes. Now in August of 1959, and that's where we are now, you are still off work at Swift and Company but your doctor had given you orders to go back. Now, what happened?

A. Dr. Safers refused to put me back at that time,

Q. That's the company doctor?

A. That's the company doctor, sredt actoost seeft to not

Q. All right. Then what happened?

A. And I went ahead on and just about September, about September the 16th or 17th he give me another statement. [fol. 31] Q. We are still in '591

A. That's same in '59, he gave' me another statement, I

taken that one to Dr. Safer to destruction of pentals mode a

Q. Who gave you that statement, Dr. Alexander

A. Dr. C.W. Alexander. . vespoold . Done ase V lennald of

(Plaintiff's Exhibit No. 1 marked for identification)

By Mr. Browne:

Q. Here is Plaintiff's Exhibit 1, I will ask you if these two letters on here that are stamped—I mean printed, "C. W. Alexander", are the two statements that you have referred to, to the jury! Are they!

A. That's right.

[fol. 30] Q. All right. And had you felt able to ON Mak

Q. Here is the one. lotab &d to largue a sint arolled know of .

A. Neither one of these, send back went bless I see I .A.

Q. Oh. He gave you a different one on now bib woll .Q.

A. No, the company has got those. bad I .A.O Hel I.A.

Q. These were in addition tute of any I have neven emergery

Q. That's the question Invanted to ask their start the

Q. Let me ask you if you got these I see the dates are weigh then, what had you got your board it down need driew

. A. He had got it down to about he got it downer Int. A.

Q. Here is one dated 5-19-'60, May 19th, I suppose, from Dr. Alexander, one dated July 8, 1960, and one from Dr. John M. Gill, that is dated, looks like July 6, 1960. Are these statements that you got from those doctors?

A. Yes, but I didn't get these here statements for the

doctor, I got these here statements here for the union.

Q. I know. Well, I am glad you made that clear. I will [fol. 32] take care of that now and then I will go back.

Mr. Browne: I now offer in evidence Plaintiff's Exhibit 1.

Mr. Panethiere: Your Honor, I object to the introduction of these records, there has been no foundation laid, it is hearsay, not the best evidence, Your Honor. The Court: Sustained but bear no base turn I but A.A.

By Mr. Browne an win on hill to this edit reducited

Q. Let me ask you this. Did you turn these over to Mr. Kobett during the fourth step of the union ! of she just asket

A. No, I turned it over to, I turned them statements over to Manuel Vaca and C. Mooney. rahuazel A. W. D. rd -1

Q. I see. You turned these various statements or copies of them over to them?

A. That's right.

Mr. Browne: I again offer them the hings of ereH .O.

Mr. Panethiere: Same objection, Your Honor, and the land The Court: Overraled "Interior the two statements that you have the transfer that you have the transfe

ferred to to the jury? Are they?

By Mr. Browne:

[[ol. 31] GoWearestillin and

(Plaintiff's Exhibit No. 1, so offered and received in evidence, is not included herein, but will be filed separately)

Mr. Browne: Now, this is going a little ahead of our story but as long as I have introduced these I will read

them right now, if I may.

Here is one "Dr. John M. Gill, Physician and Surgeon", in the heading here, I will pass these to you—looks like 7-6-'60. "This certifies I have taken the blood pressure of Benjamin Owens 7-6-'60 reading systolic 160, diastolic 100." [fol. 33] Signed "J. M. Gill."

Then, "C. W. Alexander, M.D.", and his office address, and so forth. "To whom it may concern. This is to certify that Benjamin Owens has been examined and found able to resume work 5{19-60", signed "C. W. Alexander, M.D."

Here is another one on the letterhead of C. W. Alexander, M.D., 7-8-'60, "To whom it may concern, this is to certify that Benjamin Owens has been examined by me, his blood pressure is 160 over 100. It is my opinion he is physically able to perform regular work."

(Plaintiff's Exhibits Nos. 2 and 3 marked for identifica-

Mr. Browne: Here is another one that I should have offered so they could be passing them all at the same time. I will identify that, if I may.

By Mr. Browne: Stricked additioned appearance may make

Q. Plaintiff's Exhibit 3, I will ask you if these are letters. that you also showed to the union?

A Yes, sir.

- Q. Dr. Hesser, no date on it that I can find—yes, there is, March 24, 1960, and Dr. Bruce McDonald, May 18, 1960.
 - A. That's right; bib tes if a now of shad as of now because
 - Q. Are they! What happen taled it of Mand Insw 1 . A
 - A. That's right. Include the man the tail () [88 101]

Mr. Browne: I wish to offer those in evidence and show to the jury.

(Whereupon, the following proceedings were entered of [fol. 34] record in the presence but out of the hearing of the jury:)

Mr. Panethiere: Your Honor, I think these are objectionable but I think maybe—

If you will agree, I will let any medical you have in without objection, I have one medical—

Mr. Browne: Might I see it, though. I can probably

(Discussion outside the record)

The Court: The defendants' objections to plaintiff's exhibits 2 and 3 are withdrawn, I take it?

Mr. Panethiere: Yes.

The Court: They are admitted in evidence.

(Plaintiff's Exhibits Nos. 2 and 3, so offered and received in evidence, are not included herein, but will be filed separately.)

[fol. 38] By Mr. Browne:

Q. Now, we were up to when you presented, or when this Dr. Alexander told you to go back and go to work back there. One thing I forgot to ask you, counsel for the defendants said that you were not a member of the Union. Were you a member of the Union?

A. Yes, I was a member of the Union.

Q. Speak a little louder, please.

A. Yes, I was a member of the Union.

Q. All right: Now let's go on to when this Dr. Alexander cleared you to go back to work. What did you do?

In Hester, so date on at about a constitute for

A. I went back to Dr. Safer.

[fol. 39] Q. That's the company doctor? discreted? .A.

A. That's the company doctor. He refused to put me back to work. He told me that Dr. Alexander didn't know what he was talking about.

Q. All right, entinged bad nov totach sidt, gienniat ?. O A. And told me to go home and get in my bed and lay down and rest and live my life out. Q. Did you do that! but seementate out dealer medellings in A. I couldn't do that because I wasn't able to that long. How was I going to go home and get in bed and live my life out, and they didn't give me nothing I dw a tank , yranual. Q. Now, Benny, what did you do? A. I left and I went to a doctor, his name is Sherman A. L. Land go that very day. Steinzeig. O. What day did you go Q. Steinzeig? A. Steinzeig, he's a young- owl out offer moleti. A Q. Where is his office! skat nov , wow. ayas and [14.101] A. 772 New Brotherhood Building. nov tada vistres of man Q. In Kansas City, Kansas? ___ find ob nor bill . A. Kansas City, Kansas, who was the wood I Ave Q. Did he examine you it is should be seen as the strew of shoots A. Dr. Steinzeig examined me and he waited on me for about three weeks, our entry will and Angly start . A. Q. Then what happened? nwob ored sidt exigt." avns eds A. He sent me back to work. Q. Did you get to go to work? A. I went to work that time. w on bas" - last enob I' A [fol. 40] Q. Now, counsel for the defendant stated to the jury in his opening statement that you went in on some kind of a subterfuge, or concealment, if I got him correctly, that you told them something that wasn't soemit move tad? Q A. No. No. No way in the world I could have done that. Q. What did happen! ... becomed they want to A. There was a nurse down there, her name is Helen. Q. Ellaf O: At what time? A. Helen. Helen: 19601: 3 washington of the A. Seven o'clock on January 6: 19601 Q. Helen. Where was she! Where was she then? A. She was Swift's nurse. I now of load bear I and W . K.

Q. All right. What happened to be the least which ence out.
A. I taken the statement in there to Helen it gaigest in Q.
Q. Statement from whom?
A. From Dr. Safers—not Safers—Steinzeig.

Q. Steinzeig, this doctor you had examine you?

A. That's right. the hand short of all the land.

Q. All right.

A. Helen taken the statement and she put me to work.

dive and rest and live my his mit.

What did hange t

Q. Did you go to work?

A. I went to work but I didn't go the day of the fifth of January, that's when I was down there on the fifth day of January, 1960.

Q. You didn't go that very day!

A. I didn't go that very day.

- Q What day did you go?

A. Helen wrote me two statements, she told me this, [fol. 41] she says, "Now, you take this down to your foreman to certify that you are back to work."

Q. Did you do that?

A. I done this, and my foreman told me, he say, "You come to work at seven o'clock in the morning."

Q. That's next day

A. That's right. And she gives me another statement, she says, "Take this here down there to the time office and give it to them down there."—

Q. Did you do that? I And to an on log new bill

A. I done that—"and he will put your card back in the rack."

Q. Did they put your card back in the rack!

A. They put my card back in the rack.

Q. That's your time card fare said neither dos much heat no

A. That's my time card. 10 wall divisit of A. O.

Q. Then what happened?

A. The next morning I went back to work.

Q. At what time?

A. Seven o'clock on January 6, 1960.

Q. What job did you go to work out

A. When I went back to work I went back to work doing the same thing that I had done when I left there.

Q. Hanging these chucks 1

A. Heisting these chucks. I went back doing the same thing.

[fol. 42] Q. Could you handle them?

A. I could handle them. I handled them every day that I was there the three days I was there, January the 6th, January the 7th and January the 8th, but the superintendent fixed me on a Friday at three-thirty January the 8th, on a Friday evening.

Mr. Panethiere: Who fired you?

The Witness: Superintendent of the shop, he comes and he pulls me off of the job and fired me and told me, "That's all for you and Swift and Company." I asked him the reasons.

allen od Which los ilk bing the A

o'glock' these o'clock in the avening

By Mr. Browne:

Q. What happened?

A. He says, "Well, you just ain't able to work," he says, "you are a liability to the plant, I just can't use you no longer."

Q. That was five o'clock on the third day you-

A. Three-thirty.

Q. Had you done your full day's work on that day!

A. Yes, but this other two days I worked ten hours a day, I made twenty-eight hours.

Q. Normal day is eight hours?

A. That's right, I made ten hours on the day of the 6th, I made ten hours on the day of the 7th and I made eight hours on the day of the 8th.

Q. But were still going?

A. I was still working, I would have worked ten hours [fol. 43] that day but he fired me at three-thirty.

Q. How did you feel?

A. I was feeling fine.

Q. I mean physically !

A. That's right.

Q. Were you handling the work on that day?

A. I was handling the work on that day, we need work

Q. Had you made any complaint to anybody or had anybody made any complaint that you know of about your work!

Q. Were you still doing the same thing?

A. I was doing—when the superintendent of the shop comes and pulls me off the job at three o'clock in the evening, it was three o'clock when he pulled me off, and he talked to me a while and he said, "Well," he said, "Well," he said, "You go on back and work," he says, "you work till three-thirty."

County allowed in the place of the party

Q. When did he tell you that?

A. He told me that at the same time when he fired me.

Q. I am not-I am mixed up, now. He fired you about

three-thirty.

A. I said three-thirty—he pulls me off the job at three o'clock, three o'clock in the evening, and he talked to me about five minutes. agwiam.lan bor s

Q. Yes

A. And he told me to go get on back and make my full day out. ne fine of enck on glefting day yeg

[fol. 45] Q. All right. Now, were you ever able to get back on the job then after that time?

A. No, no.

Q. Did you try? I mean were you willing and felt able to go back at all times?

A. That's right, I tried and I carried doctors' statements down there to the company that we ain't got here, they got them.

Q. Oh, you turned them in ?..

A. That's right. These here statements what we got here themselves, the statements I got and turned directly to the Union. mile territory and

By Mr. Browne: 110 HTGW / Muliferral new o Q. Now then what is the next thing you did after they wouldn't put you back, or took you off the job, let's say, and said that you couldn't work for them any more, what? did you do, as a union member?

A. The first man that I went to was a man they called Jeffrey Rush. O. Flaherty! Q. Rush?

A. That's right.

Q. And what happened? Q. What was his job in the union? dentil gerhal all A

A. Well, he was the treasurer of the union and he also was a representative, representative of the

Q. Was he a steward or just a representative?

[fol. 46] A. He was a representative.

Q. Business representative? __overl . M. and blor oH .A.

A. That's right.

Q. All right, Mr. Rush, and what did you do with reference to making a complaint or not in this matter, or A. He says,"Mr. Sharp fired this tem Friday of sacretist

A. It was on a Friday evening, I went to Mr. Rush and I told him what had happened, I told him Mr. Sharp had just fired me on account of my health, and Mr. Rush told me this, he said, "Mr. Sharp is always doing something that he ain't got no business," he say, "I ain't going to let him get away with it," vedt his treve yes al bus HeW .Q

A. He looked at his watch and he says, "Well, it's a little late now," he says, "It's a little late, I can't do you no good this evening, but," he said, "I will tell you what you do, you meet me in the union hall at twelve o'clock Monday," he says, "we will get this here matter straightened up right quick." less went through no first step as I

Q. Did you go there as he asked you to?

it, any way, went on in the regular course to bib I self in Q. I will ask you whether or not then you put your grievance in the hands of the union?

A. I did.

Q. All right. Then what is the next thing that happened? A. Monday when I went there Mr. Rush, he came out, and they had a president by the name of Dave

Q. I didn't get that at all.

[fol. 47] A. I say it was the president there of the union, his name was Dave Flaherty, and for the helbush of W. O

Q. Flaherty!

Q. Were you still doing the same thing?

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Lorent Simus from bl

Q. When did he tell you that?

A. He told me that at the same time when he fired me.

Q. I am not-I am mixed up, now. He fired you about three-thirty.

A. I said three-thirty-he-pulls me off the job at three o'clock, three o'clock in the evening, and he talked to me about five minutes.

O. Yes.

A. And he told me to go get on back and make my full day out. 92

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By Mr. Browne: no show and no those no

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A. It was on a Friday-evening, I went to Mr. Bush and I told him what had happened, I told him Mr. Sharp had just fired me on account of my health, and Mr. Rush told me this, he said, "Mr. Sharp is always doing something that he ain't got no business," he say, "I ain't going to let him get away with it." voil bib . 2000

Q. All right. So did you put the matter-

A. He looked at his watch and he says, "Well, it's a little late now," he says, "It's a little late, I can't do you no good this evening, but," he said, "I will tell you what you do, you meet me in the union hall at twelve o'clock Monday," he says, "we will get this here matter straightened up right quick."

Q. Did you go there as he asked you to?

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[fol. 47] A. I say it was the president there of the union, his name was Dave Flaherty and rot hi belband of W. C

b A. Flaherty m a may of larger I than many heart hall

Q. Flaherty!

A. That's right.

Q. And what happened?

A. Mr. Jeffrey Rush comes in and told-

- Q. Mr. Rush is the one that you first took your grievance
 - A. That's right.

Q. All right.

A. He told him, Mr. Dave-

Q. Mr.-

A. Dave Flaherty.

Q. Dave Flaherty. All right.

A. He says, "Mr. Sharp fired this man Friday on account of his health." Here is the answer that Mr. Dave give Rush. He says, "Oh, no, no," he says, "Mr. Sharp didn't fire Ben." he said, "the medical department fired him," he said, "that's who fired him," he said, "Mr. Sharp didn't fire him," he said, "the medical department fired him."

Q. Well, and in any event, did they push it? That's what I want to get at, and what steps you went through; tell the

jury what happened.

A. Well, about eight months from then it went through the second step.

Q. Now, the first step was, we read that all off. Anyway

you went through the first step?

A. Never went through no first step as I know of. [fol. 48] Q. Whether you went through it or not, skipped it, any way, went on in the regular course to the next step?

A. That's right.

Q. Step two? All right. Then the second step what did you do? Now, that's the step with the division superintendent or general foreman. Did you go through that step or were you there then? and they had a mesident

His the southwest thib it is

Lythodel'l A

A. That's the second step?

Q. Yes.

A. Yes, I sat in on the second step.

Q. Who handled it for the union?

the hards fords deponds

A. Well, Mr. C. Mooney was there.

Q. This gentleman's award a special draw reading literia

A. Yes, the gentleman sitting right there.

Q. Mr. Mooney!

A. That's right.

that this pull high dimit. Q. And was your grievance successful in the second step?

A. No. No. The superintendent just told them I wasn't coming back there, there wasn't no chance for me, told them that was it, and everybody just got up and walked off. Q. Including you feet, on a result with delayer file

A. He didn't say not one word.

Q. Was there any evidence put on or any of these medical-things that the jury is seeing, any of that produced there at the second step!

[fol. 49] A. Well, the superintendent had an old what you call a work sheet which they wrote up himself and they went to some weak doctor-

Mr. Panethiere: Which doctor?

The Witness: A doctor they called Dr. Morris.

By Mr. Browne:

Q. Morris?

A. Morris, he was a practice doctor out there at the Kansas University.

m Kamaka City, Missonnil .

Q. All right. In any event, to shorten it, your second step was unsuccessful?

A. Unsuccessful. one tank of og at bewelld graw nov . Q. The company turned it down?

A. Yes.

Q. All right. Then did the union take you through the third step and if so, tell what happened there. Now, let's see, that's the plant superintendent or his representative. Did they go through the third step with you!

A. They told me that they did.

Q. You weren't present?

A. I couldn't sit in.

Q. Oh.

A. They just only told me that they went through, whether they went through it, now, I don't know.

Q. Well, I know, but they told you that they had gone

through that?

A. That's right.

Q. And unsuccessfully?

A. Yes. word blat lang a treatment ...

Q. Is that right?

A. That's right.

Q. All right. Now then we are getting to the fourth step [fol. 50] and according to this that's the general superintendent of the company and the national representative of the union. Now, did you have some kind of a hearing in the fourth step?

A. Yes, we did.

- Q. Where was that held?
- A. It was held in the President Hotel approximately around the second floor.

Q. Here in town?

A. Here in town.

Q. In Kansas City, Missouri?

A. Kansas City, Missouri.

Q. And was this Mr. Kobetts, this gentleman right here behind your lawyer—

A. That's the gentleman right there.

Q. He participated for the national union?

A. That's right.

Q. You were allowed to go to that one, were you?

A. Yes, I sat in on that one.

Q. Now at that one were you given—had you given photographic copies of these medical reports to the union people?

A. Yes, medical reports, the same, they had them, it was turned over to them.

Q. Now, what happened in this fourth step hearing over in the President Hotel?

A. Well, they was unsuccessful.

Q. But did they actually tell you any result? Were you able to get the result at that time or did you just leave

[fol. 51] after the hearing?

A. Well, no, not exactly left after the hearing, the superintendent told the union that they could take here's just the way he spoke it-he says, "You all take this man to a heart association, to a heart association and," he says, "the heart association will give this man some money, and", he said, "it will teach this man to work, it will rehabilitate him, and," he says, "when he get out," he says, "he will . honestly be making more money through the rehabilitation than he will with Swift and Company anyway," and so-

Q. Now, Mr. Owens, excuse me, were you finished with that? Now, at that time, tell the jury whether you still felt

able to go to work or whether you did not?

A. I still felt like that I was able to go to work without

going through any rehabilitation. The stallob barbond sould

Q. All right. Now then did you make any request or not to the union to carry you through the fifth step where you would for the first time get a non-interested person as arbitrator? Mol. 331. Mrs. Panethierer Your Honor. L'obie

Mr. Panethiere: I object to the leading questions, Your Honor te ed fire ted geor noitearp natheod, stane

The Court: Sustained and the wast of the court of an

Mr. Browne: I will change that.

By Mr. Browne: Q. I will ask you if you made any request to go through [fol. 52] the fifth step of the union or whether you did not?

19 till step! Did you yver have any agree ment bibila.A

Q. To what official of the defendants did you make that request?

A. Mr. Manuel Vaca. V T. Hall to I've Head to be well

QuVa cal atter suniting of vortetin as top nor a decrean

A. That's right. ... Ityourgets in her too nov hily to may hily

Q. He lives in Missouri here?

A. That's right.

Q. And what request or what was your conversation by the way, he was officer then of the local branch of the union?

A. He was president. Tella that villaged for an -Holf .A.

Q. All right. And what was your conversation with him?

Just tell the jury exactly what was said there.

A. I asked him, asked Mr. Vaca about taking through the fifth step, Mr. Manuel Vaca told me, he says, "I ain't got money to take it to the fifth step," he says, "you give me three hundred dollars, that's what it takes, and I will take it to the fifth step." I told him, "I haven't got any three hundred dollars, if I had three hundred dollars I wouldn't be asking to be taken to the fifth step." So the 's the way he left it. He asked me for three hundred dollars to represent me for the fifth step.

Q. Did you ever have any agreement that you would pay

three hundred dollars or anything else!

O. All right Now that did you make have depre life. O

Q. To the union for doing what this contract tells them to do the property of the contract tells them

[fol. 53] Mr. Panethiere: Your Honor, I object to counsel testifying.

The Court: Leading question, yes, that will be stricken from the record, the jury will disregard it.

By Mr. Browne:

Q. Did you have any understanding of not at any time that they were to be paid, or Vaca, or anybody else was to be paid three hundred dollars to process your claim through the fifth step! Did you ever have any agreement with anyone!

A. No.

Q. Mr. Owens, then after that, I will ask you whether or not, when you got an attorney to continue with this matter, did you or did you not get an attorney?

was a successful dissource bared innossile dissovil off. Q

A. That's right.

A. I did.

Q. Have you ever been able to get back on the job or go through the fifth step, or do any of that her vin but A.A.

seasonable job down here, at Kara Belt 200 on of , ol. A. Q. About how many members are there in the union locally here and in this area, about 1 1 1 1 10 (Con 101)

A. I would say about eight thousand.

Q. No, I mean here in this area. Ynageson a si il A

Q. Yes.

Q. What is the name of the company of a ted W. Q. A. Between twelve and sixteen hundred.

Q. And about how many nationally in the whole union? I mean as far as you can estimate.

A: Just a rough guess, I'd say about eight thousand [fol. 54] Q. All right. Did you at the time this suit was filed know of any other members of the union that lived in this state of Missouri except the ones you named who were ably for about two or three mouths and then then to (Reces) the back, I goes back to learn field, I goes back to (seesas) it

and I handle those sacket meed to be a himitred rounds but

dendo By Mr. Browner of which and web applicates doubt red;

Q. I have forgotten my last question but anyway let me ask you as to what in the nature of work, if you will tell the jury, you have been able to do, what kind of work you have been able to get during the intervening, what is it, three and a half years since Swift refused to let you go back on what, you told the date, but around August of '60. Now what have you done since then? object to counsel charging his testimulaw An

Q. Speak loud.

A. I have done a little contract work, cutting cement, roofing houses, and I have helped on jobs, I worked at the Jewish Center out here on the 87th and Holmes I believe it is if I ain't badly mistaken, and I have worked for-I worked for the Overland Park car wash for several months.

A. The biggest of them weigh Ally poor the your have some weighed olghty pounds. Q. All right; on a war in the day wer back of the flat. (I'A c.Q to

A. And my regular job where I works every year, it's a seasonable job down here at Farm Belt, 2400 State Line in Armourdale down here on the river.

[fol. 55] Q. What is the name of that company? Is it a

A. It is a company, we puts out fertilizer. Here is the last four checks.

Q. What is the name of the company!

A. Spencer.

Q. Spencer Chemical Company

A. Yes, Spencer Chemical Company. Some of you may be acquainted with it. I work there every year but just as I said, it is a seasonable job, I just work there, you know, putting the grain in and the farm in, just farm work, after then they lays me off. After they lays me off, then I goes and puts in my compensation, I draws compensation probably for about two or three months and then they calls me back, I goes back to Farm Belt, I goes back to Farm Belt and I handle those sacks, used to be a hundred pounds but they have cut them down to fifty pounds and eighty pounds now, and they handles just about five a minute.

Q. What, come by you five a minute?

A. Just about five a minute.

Q. What could you do with the fifty and eighty pound sacks?

A. Well, we puts them on trucks-

Mr. Panethiere: Your Honor, it is in evidence fifty pounds, I object to counsel changing his testimony, Your Honor.

The Court: Overruled. grinos eithi a subb orks

Mr. Panethiere: I think he said fifty pounds.

[fol. 56] By Mr. Browne:

Q. How much do they weight

A. The biggest of them weigh fifty pounds but they do have some weighed eighty pounds.

- Q. Fifty to eighty pounds, then I was and advanced Wark.
- A. That's right.
- Q. Used to weigh how much?
- . A. One hundred.
- Q. Did you handle those, too, manhandle those hundred pounders when they had them? . Anow disclosing which the
 - Q. West if it going, how steady, how many size key A.
 - Q. Did you handle them yourself?
 - A. You have to handle them yourself. A. Mirow W. A.

Q. What do you do with those sacks, fifty, eighty, formerly hundred pounders? von The about of old A. A.

- A. You have to get a truck load, I has the truck, I pulls it in the box car wherever it is going, storage, you know, maybe they want to keep it, maybe they are shipping it out, maybe they were shipping out a thousand, two thousand sacks, you know, to some point, you know, some city, and so on.
 - Q. Does this call for any lifting, these sacks?

A. All lifting.

- Q. How high! How much do you have to lift them!
- A. The fifty pound sacks go as high as seventeen high.
- Q. Wait a minute. You mean lifting from the floor-

harve against one, he will tell the

A. You start from the floor.

Q. Yes.

A. And up.

Q. How do you get up seventeen sacks high! [fol. 57] A. You put them up there.

Q. Oh, they must be laid on their sides, is that it?

- A. Yes, laid right flat, you put one on top of the other.
- Q. Well then you have to heist it over your head, I guess?

A. Sure.

Q. Has this been going on—this is the Spencer Chemical job you are talking about? as sesides won their IlA .O

A. That's right on tak honors scould said a distribution Q. About how many hours a day do you do that work heisting fifty to eighty pound sacks as high as seventeen high sometimes (Vasquad) that thing is gained boy brow

A. We works, we works about, about thirteen or fourteen hours.

Land to weigh how much? In

Q. A day!

A. A day.

Q. And how steady, you said it is seasonal work!

A. It is seasonal work. The bad godf nedw arahamag

Q. When it is going, how steady, how many days a week, about?

A. We works six days a week.

Q. Are you able to handle that job!

A. Able to handle it. They just laid me off last week.

Q. Laid you off on adcount of health, or-

A. No, no, no, no, laid off because lack of work. want to keep it maybe they are shipping it out

[fol.58] Q. Are you able, have you been able to get a job with some major company, I mean an all-year around job, since this happened, since you were laid off there at Swifts?

A. No, I haven't.

Q. Why not?

A. For the reason I ain't got no recommendation.

[fol. 59] Q. All right.

A. Swift won't recommend me, on the recommendation he would give it won't do me no good, he will put that sick charge against me, he will tell the man "He worked for us so many years, he was a good man but he's sick now, he just ain't able to work." A. You put them quite

Mr. Panethiere: Your Honor, I object to the answer, not responsive to the question and for the right big asy The Court: Sustained it taled of avail nov mentalle W.

Has this freen going on this is enwerd all venice

Q. All right, now, besides Spencers or maybe the jury would rather pass those around. Let me ask you what your earning, to put it in a yearly basis, you said on the monthly I mean the hourly basis, but in a year's time about what were you earning at Swift and Company?

A. About sixty-two, sixty-five hundred dollars a year at the time when I left we ver sexual table I venequies a rot and -

Q. Now, to give—you have mentioned the Spencer Chemical and some others and I didn't mean to cut you off on that. Are there other heavy jobs that you have done since you have been off from Swifts, as you could get them? If so, tell the jury. Telepook nor lead until

A. Yes. As I say, I worked for Overland Park and I worked for-Q. Yard work!

Q. Was that the City of Overland Park?

A. Overland Park, wand emes abuted tent seed Q.

[fol. 60] Q. The City? Overland Park?

A. Overland Park, Kansas. 10. Wyley of all shore if A

Q. Well, what kind of work? and ob or olds nov or A. ...

A. Well, that's a light job.
Q. Oh. spirs mov had serge reverse the man had be A. That's just, you know, washing and drying cars.

Q. Oh, the I know. Tasl out 38 100 .00 - 18 100 .07 A. I know you have been around these car washes. Q. Carwashing tyen ton to request what she live I still to

ople to work that were junior to you, on the selfor Q. That is not too hard a work?

A. No, that's not too hard a work.

Q. A lot of stooping, I guess, and all that; no heavy lifting. [fol. 68] (Witness excused.)

A. That's right.

Q. What else have you done?

A. I worked for this here Shostak Iron and Metal over here at Third and Broadway. : englishmall all vil

Q. Was that heavy work or not?

A. Yes, that's heavy work around a junk yard, handling iron.

Q. Lifting iron?

A. Handling iron, cutting iron on the machine, you know.

Q. Could you do that lifting? A. Yes.

Q. What other kind of work? A. Wet right then he didn't

A, Another kind of work, when I runs out of work, working for a company, I just makes my own jobs.

Q. Like what I dt beneitment year noy-

A. Like trimming trees, cutting down trees, cutting [fol. 61] yards, and cleaning houses, cleaning out basements.

- Q. Oh. Just for people?
- A. Yes.
- Q. Yard work?
- A. Yes. White I back to to very out fast
- Q. Does that include some heavy work and some not
 - A. It runs in to heavy work sometimes.
 - Q. Are you able to do that they to bein their deliver.

A. Yes, sir.

dog stepli sadagir dight / / Q. All right. Did you ever agree that your grievance be held by the union in the fourth step?

A. No, not at—no, not at the last time, no.

resulting the bear and all the hear

Q. Now, during this time that you have been off from Swifts, I will ask you whether or not they have called back people to work that were junior to you, on the seniority list?

that's not too hard a work

Albert Start Total

O. What else have you done?

A. I syordend for this how that

A. Oh, sure. Yes.

[fol. 68] (Witness excused.)

Cross examination.

By Mr. Panethiere: Viswbianth bea brid P. to orni

Q. Was that heavy work or not Q. Mr. Owens, when you took off-you went on sick leave did you not?

A. That's right.

Q. And when did you take, or start your sick leave?

A. The last day I worked was on 23rd of May.

Q. That is 19597

A. 1959. har other hind of works, the sentens

Q. If I understand, understood your testimony correctly [fol. 69] you said you went out feeling bad.

A. Yes, I was feeling bad and I was tired.

Q. And you went to Dr. Phillip Saper?

A. I went and reported to Dr. Phillip Saper before I went.

Q. He is the company's doctor, he is the plant physician, is he not, right there at Swift and Company!

A. Yes.

Q. What did he tell you?

A. He taken my pressure.

Q. Your blood pressure?

A. Yes, he told me I was all right, go ahead on, that I would get my money, don't worry about that.

Q. What did he mean, told you to go ahead on?

A. Don't worry about my money because he would see to me getting my money.

Q. You had some sick leave pay coming under the con-

tract?

A. That's right.

Q. All right. Now, when you went off on May 23rd, who was the first doctor that you saw after that?

A. Dr. C. W. Alexander. in all a sweller me

Q. When was the first time you saw him?

A. The first time!

Q. Yes.

A. Well, Dr. C. W. Alexander has been my doctor for the last twenty years.

Q. And after May 23rd, when is the first time you saw him? A. A stored This bogo week at that time.

18 other out robbin Hits king

[fol. 70] Mr. Browne: '591

By Mr. Panethiere:

Q. Of 1959. When the state of t Q. Of 1959. A. The next day, May the 24th, which was on a Saturday, I am pretty sure.

Q. Did he give you a complete examination!

A. Not right then he didn't.

Q. Did he prescribe any medication for your

A. He just give me some temporarily right then. I told him—now, he didn't request me to go to the hospital. I requested myself.

Q. And he put you in the hospital?

A. That's right.

Q. That was the K.U. Medical Center?

A. No, I went to Douglas. .

Q. Douglas Hospital!

A. That's right.

Q. When were you admitted to Douglas Hospital?

A. That was on a Saturday, as I said, and I went to Douglas Hospital, I got there on a Monday night, Monday night, I believe it was about May, maybe it was about the 25th of May when I went in to Douglas Hospital.

nov flat ad bib half

Q. In other words, you requested your sick leave effec-

tive May 23rd?

A. Yes, sir.

Q. You saw Dr. Saper that day?

A. I didn't see Dr. Saper until May the 24th.

Q. That is the next day?

A. No, that was on a Monday because—
[fol. 71] Q. I am talking about the company doctor.

A. The company doctor, I didn't see him until the 25th.

Q. All right. You saw Dr. Alexander on the 24th?

A. Yes, that's right, on a Saturday.

Q. And he wanted to put you in the hospital?

A. That's right. At least, I requested to go.

WQ. How long did you stay in Douglas Hospital?

A. I stayed there one week at that time.

Q. And after you were released from the hospital, you were still under the care of Dr. Alexander?

A. I was.

Q. How long did you remain under his care?

A. About two months and a half before he releases me

Q. That takes you up until, is that when you referred to sometime in August?

[fol 73] Q. Now, you are not saying are you tangut. A Q. He released you to go back to work?

A. He released me to go back to work.

Q. When you reported back for work, did they in the company require you to take a physical examination?

A. No, no, not the company.

Q. Did you see Dr. Saper at all?

A. I seen Dr. Saper.

Q. What did he tell you?

A. Dr. Saper just taken my pressure and told me I wasn't near ready to go to work by a long shot, that that [fol. 72] doctor didn't knew what he was talking about.

Q. He was talking about the company doctor, now?

A. No-yes, I am talking about the company doctor now.

Mr. Browne: The company doctor is talking about his doctor. you were notified you were terminated

By Mr. Panethiere: Dr. hor bib . ab synar tant

Q. Dr. Saper is the company doctor, is that right?

A. That's right.

Q. Then you went back and you didn't-you stayed off work some more?

A. That's right.

Q. You were still drawing your sick leave!

A. I was still drawing my sick leave.

Q. When would your sick leave pay expire, when would it end, how much sick leave did you have coming!

A. I believe, they paid me sixty per cent of my wages for twenty-seven weeks and sixty per cent come to \$63.00-

Q. I don't mean the amount. When would the twentyseven weeks be up from May 23rd?

A. Well, they quit paying me somewhere around about the second week in June in 1960.

Q: That's about the time that you had this letter from Dr. Steinzeig that you took in to the nurse, is that right?

A. Yes, sir, about a week after then.

Q. About a week after your sick leave time was up?

A. Yes.

[fol. 73] Q. Now, you are not saying, are you, Mr. Owens, that the union had anything to do with having you fired? that they easy governot sugar ke

A. No. sir.

Q. And when they told you there on January the 8th that you were terminated, that was the company, was it not?

A. That was the company, and a respect to the more in

Q. There was no member of the union present when you were terminated?

A. Well, the way, I didn't get the words come out of the man's mouth but it was out working in a bunch of men, about twenty men was in the bunch.

Q. I mean any official of the union, steward or any of the officials?

A. No, there was none there right at that particular time then.

Q. When you were notified you were terminated, you went that same day, did you not, and talked to Mr. Jeffrey Rush !

A. Yes, sir, that's right.

Q. He told you that he didn't think you got a square deal and the union was going to take care of it?

A. That's right.

Q. All right. Then you saw Dave Flaherty the next day? Are you sure it was Dave Flaherty!

A. Dave Flaherty, yes.

Q. He was president of the local?

A. That's right. But I didn't see him the next day. This [fol. 74] here happened on a Friday, and I didn't see Dave and the union officials no more until that coming Monday.

Q. Now, you remember filing your grievance?

A. That's right.

Q. And the union did process that grievance for you, did they not?

Mr. Browne: You mean all the way through, counsel?

Mr. Panethiere: I am talking about processing.

Mr. Browne: I don't know what he means by processing. The Court: Overruled. He may answer.

Main HA .O

By Mr. Panethiere:

Q. Did the union take steps to try to get your job back?

A. Well, I turned it in on the eleventh.

Q. The eleventh of January! and to see him .

A. Of January.

Q. All right. all is too squal all was pale bay

A. 1960, and the first time that they made an effort to the second step is way up in August.

Q: But they had a first step before that, did they not?

A. They-if they went through any first step, I doesn't know anything about it.

Q. In order to have the second step, Mr. Owens, it is

obvious you have to have the first step.

A. I say if they went through a first step, I don't know nothing about it.

[fol. 75] . Q. So then after you notified the union there was some question about your physical condition?

A. That's right.

Q. Isn't that what it all boiled down to?

A. That's what it all boiled down to.

Q. That is when you started to going to these different doctors?

A. Right.

Q. Now, how many doctors have you actually seen, Mr. Owens, if you can remember them all?

the Language Parent Land

A. Liorgol a dottor in furror

A. Let's see-

Q. I mean give me their names.

A. Oh. C. W. Alexander.

Q. Wait just a minute. All right.

A. Dr. Hesser.

Q. That is Heizer?

A. Hesser.

SQ. Hesser! blancy I considerated and management and

Q. H-e-s-s-e-ri

A. Yes, sir.

Q. All right.

A. Dr. McDonald.

Q. All right.

A. And Dr. Gill.

Q. All right. Now, you also saw Dr. Saper, did you not! That is this plant doctor.

A. Oh, yes, I had to see him.

Q. You also saw Dr. Morris out at the K. U. Medical Center, didn't you?

A. Dr. Morris!

Q. Yes.

A. Yes, I seen Dr. Morris.

Q. You also saw a Dr. Day?

A. I don't know what the man was, I never seen the [fol. 76] man from, that was my first time ever seeing the man in my life and I never saw him no more from that day to this.

Q. Who are you talking about, Dr. Day!

A. Dr. Day.

Q. You did see him, then?

A. I saw him at the time, you know, when the union-

Q. I will get to that but you did see him too. All right. Now, Dr. Alexander was your treating doctor, was he not, he took care of you for twenty years?

A. That's right. "

Q. Why did you go to Dr. Gill!

A. Why did I go to Dr. Gill?

Q. Why did you go to Dr. Gill!

A. Well, this doctor just kept a preaching to me that, you know, that my condition was so bad, it was beginning to worry me.

Mr. Browne: Which doctor kept telling you that?

A. The company doctor.

Mr. Panethiere: Your Honor, I would appreciate if counsel would let me ask the questions here.

The Court: That is correct.

Mr. Browne: All right.

A. I forgot a doctor in there.

ing the Francis is turning a

By Mr. Panethiere:

Q. Which one is that?

A. Sherman Steinzeig. He is the man I went to work under.

Q. All right. Now my question was how did you happen [fol. 77] to go to Dr. Gill?

A. Dr. Gall?

Q. Yes. Hearty boold and bauf ingles of the

A. Well, I always went, I went to Dr. Gill too, for small things, I used Dr. Gill.

Q. Do you remember seeing him in July, about July 6th of 1960!

A. I think so.

Q. Now this was after your grievance had already been started. Right? You told the union about that grievance in January?

A. I told them about it, yes.

Q. And you had your-

A. But nothing hadn't been done.

Q. As far as any of these second or third or fourth steps? The of side

A. Not a single step out of all of that time.

Q. But then you saw him on July 6th?

A. That's right.

Q. All right. What did you tell Dr. Gill when you went in to see him?

A. I just went in, you know, because the company's doctors all made out like that my pressure was so high, you know, that I was going to die, I was concerned, I was earnestly concerned in my health, I went to Dr. Gill, went to these different doctors, these doctors don't know nothing about one another, all of them give me the same reason, the same reason, I was concerned, it was scaring me.

Q. Why did you tell Dr. Gill you needed some kind of

[fol. 78] statement from him?

A. To show these people that I was getting a rough deal out of the company.

Q. And you requested him to take your blood pressure and put it down?

A. That's right,

- Q. That's what he did here on plaintiff's exhibit 1, it shows the blood pressure. Did he make an examination of any part of your body other than taking your blood pressure?
 - A. No, that's all, he taken just the blood pressure.

Q. All he did was take your blood pressure?

A. That's right.

Q. Had you known Dr. Gill before?

A. Yes, I been knowing Dr. Gill the last, about fifteen years.

Q. He is a friend of yours? You know him personally? A. No, no more than just in his office. We didn't go to church together or lodge together, you know, anything like that. Just I just only see him there in his office when I want quick service, you know, and stuff, because he didn't have too many patients and I could just walk right in there, you know, and just walk right out, but Dr. Alexander was different, you go in his office, you are liable to have to stay in there—

Q. Well, Dr. Alexander, two different times here in May said that you were able to resume work, then in July you go to Dr. Gill. You didn't believe Dr. Alexander!

[fol. 79] Mr. Browne: Objected to as argumentative.
Mr. Panethiere: This is cross-examination, Your Honor.
The Court: Overfuled.

A. Just as I said, when one man disputed the other man, I am going to go to two or three more men, you know, then I am going to take the biggest majority. Dr. Saper told me that Dr. Alexander was lying and he didn't know what he was talking about about my blood pressure. Dr. Alexander give me a reading of 160, 170, went on like that, then I turned right in then and goes to Dr. Saper and Dr. Saper say that my blood pressure was so high he couldn't take it, 265—you know—I was beginning to get concerned.

Q. Well, anybody would be concerned about their health. That is what the whole issue here is, isn't it, Mr. Owens, is your health condition! the Lacro Black Hope Staff La

A. That's right.

Mr. Browne: What the issue is will be for the Court to determine. We object to that. remember getting that from Pr.

The Court: Sustained.

tent By Mr. Panethiere Her refinite a lad nov out . O

Q. When you went to Dr. Gill, then you went to another doctor, didn't you! Two days later you went back to Dr. Alexander! see to mad now did you happen to see of administrations of the see of the see

A Yes, thien told not to ke bick of Dr. Hesself A Q. All right. And you asked him for a report. All right. [fol. 80] And prior to that time on May 18th you went to Dr. McDonald. Right 1 going intaxo atalegue a al

A. That's right assent boold ver trains vine faul all Q. How many times did you see Dr. McDonald 1

A. As near as I can remember it was about five different times. The buy flor nothing in his light.

Q. Was he treating you!

A. Yes, he give me some pills and told me to get on a Q. Actually the major to you to get these did the plantage.

Q. Now, this was in early May of 1960?

A. That's right. tant words of between Jan, becaused :, Q. You had been off work over a year at that time?

A. Around about a year.
Q. And you still found it necessary to take treatment, weren't you still being treated by a doctor? Isn't that correct? You will have to answer, she can't take down the nods, see.
A. That's correct. 4. And you gave them to them?

Q. But then he stated, or you requested of him a statement as to whether or not you could return to work, isn't that right? band may wheel through all no at ine Land histor

A. But as far as the treatment is concerned, every doctor that I went to, he told me it would pay me to stay under treatment the rest of my life. . was garage silt asswind driet bas Q. Well, my question is this, did you request of Dr. Mc-Donald a statement; you told him you wanted to go back to work, didn't you?

A. That's right. I did.

[fol. 81] Q. And he gave you that statement. That is plaintiff's exhibit 3 we are talking about here. Do you remember getting that from Dr. McDonald?

A. I sure do.

Q. Also you had a similar one from Dr. Hesser just about a month before?

A. No, it was longer than that.

Q. Well, March of 1960, beg your pardon, about two months before, and how did you happen to see Dr. Hesser?

A. The union told me to go and see Dr. Hesser. Dr.

Hesser is the union doctor.

Q. All right. And he gave you this report here showing

he made a complete examination, didn't he?

A. He just only taken my blood pressure and my heart, you know, because Dr. Hesser isn't—he's a surgeon doctor, that's what he is.

Q. Did the union tell you why they wanted these statements?

A. Yes.

Q. Actually the union told you to get these, didn't they?

A. That's right.

Q. Because they wanted to show that as far as your thinking was concerned that you felt that you were physically able to do the work?

A. That's right.

Q. And they asked you to get these, didn't they? [fol. 82] A. They did.

Q. And you gave them to them?

A. That's right.

Q. And then they went on and processed it to the second step, didn't they!

A. Yes, I sat in on the second step.

Q. You were not present at that time, at that time these medical reports were all entered and were discussed back and forth between the company and the union?

A. No.

Q. Weren't these medical reports there?

A. Not in the second step. There wasn't a doctor's statement come up in the second step, nothing but this herenow, the company had that there work sheet there from Dr. Morris of the K. U. Medical Center.

Q. You know Mr. Sharp, don't you?

A. Yes, sir, I know him very well.

Q. What is his position with Swift and Company?

A. He is a plant superintendent.

(Defendant's Exhibit No. 17 marked for identification.)

Mr. Browner Let me tak

forest sworts that before

By Mr. Panethiere:

Q. Can you remember about when this second step meeting was held? A. Very well. Postor Aten for hell se nothernes le

Q. What was the date?

A. About August.

Q. About August 18, 1960, would that be about right

A. Yes, that sounds pretty close. [fol. 83] Q. And were the persons present at that time Leonard Jamerson_

A. Leonard Jamerson and Caleb Mooney.

Q. He was a union representative, was he not?

A. That's right.

Q. Mr. Mooney was the vice-president of the union, is that right? an Hopet, Londing

A. That's right.

Q. You were present? Alas as as hadroid O. conwell

A. I was present, yes. Q. There was a Mr. H. T. Button, a foreman, present?

A. Howard Button.

Q. And Mr. Sharp, the division superintendent was present?

A. That's right sidebilis distant's distant Adgir a'tadT . A.d Q. I will hand you what has been marked for identification as Defendant's Exhibit No. 17 and ask you to read

that, and see if that correctly reflects what happened on the day of that meeting! Do you need your glasses, Ben!

A.I need them but I ain't got them.

Mr. Browne: Try mine, have got magnification in the lower half.

A. Yes, I remember. I remember.

By Mr. Panethiere

Q Does that refresh your memory new!

Mr. Browne: Let me take a look, too.

By Mr. Panethiere is decela a discount

Q. My question is that correctly reflects what happened at that second step meeting, does it not? That's about what happened that shows here?

[fol. 84] A. I remember the meeting, they was there and

Mr. Sharp done all the talking.

Q. Well, my question is this, does this correctly reflect what happened at that meeting?

A. Yes, except Mr.

Q. My question is this, does this correctly reflect what happened at that meeting!

A. Yes whithe tacking one our our

Mr. Panethiere: Your Honor, I offer in evidence Defendant's Exhibit No. 17.

Mr. Browne: Objected to as self-serving.

The Court: Overruled. It will be received.

(Defendant's Exhibit No. 17, so offered and received in evidence, is not included herein, but will be filed separately).

Mr. Panethiere: Defendant's Exhibit No. 17, I will read to the jury, it is very short.

(Defendant's Exhibit No. 17 was read to the jury by counsel)

By Mr. Panethiere: President Turket Bluis, 100 . Int.

Q. Now, my question initially was weren't these presented and discussed at the second step | well asour

Mr. Browne: What? What are you talking about? Mr. Panethiere: Plaintiff's Exhibits I and 3, the medical reports that you obtained at the union's request.

A. Dr. Saper did.

A. The superintendent talked. A told of bus regard

that you were thresteasty anulie to wor By Mr. Panethiere: [fol. 85]

Q. Pardont vas ad I'mhib tant biss con sirtold rel Q

A. The superintendent talked a second All - and all

Q. Well, my question, you were there, were you not?

A I was there that's how I know. at noticed by the

Q. The purpose of the meeting was to discuss your grievance, wasn't it! all nothing and mount of sinkery

A. That's right, and I am telling you what happened.

Q. Weren't these medical reports shown to the company?

A. No, not them, no.

Q. Well, which ones were, then!

A. Mr. Sharp had a medical report there that he claimed that he went out to the K. U. Medical Center to where I had been talking treatments out there and got and that's the onliest one I seen, what they called the work sheet.

Q. That is Dr. Morris that he is talking about?

A. That's right.

Q. And that is referred to in that note, isn't it, minutes of the meeting, that is referred to?

I understand what you are talking about well the Q. Also refers to that the company's position, states that . the company furnished medical statements showing that your blood pressure had improved, and they were referring to these statements, weren't they!

new Planting rists with a chief at the wife at least a long rismold

A. No Non No, not then I grader of rotas I tombell . J . H

Mr. Browne: What statements, now!

(fol. 86) By Mr. Panethiere:

Q. What statements were they referring to, Bent ...

A. I guess they was referring to their own statement, Mr. Sharp got a statement out there some kind of way.

Q. Maybe you don't understand me, Mr. Owens. I understand that the company's position at all times was that you were physically unable to work, is that correct, both by Dr. Saper and by Dr. Morris, is that correct, they both said that you were physically unable to work?

Q. Dr. Morris also said that, didn't he say that-

A. It was-Dr. Morris isn't got no record, he can't show Well, my question, you were the blow at mi broses a

Q. My question is not whether they had a record, did they have some medical reports from Dr. Morris, stating that it was his opinion his opinion that you were physically unable to work! Yout's right and I am tellade vent

A. And I-

Words structed fred medical slowers Q. Answer my question.

Mr. Browne: He's trying to. We object to counsel cut-A. bir. Shere had a medatal report there that no mid guit.

No, not them, no.

A. That want I is

A. I ain't going to tell you something against myself, I ain't going to do it. onliest one. I seem what they called the

Q That is Dr. Morris that her By Mr. Panethiere:

Q. We don't want you to. Do you understand my question! From the morning that he referred to ! stood! - suvore ! ! noit

A. I understand what you are talking about but it is [101:87] not true son alves men sait tant of analy said. O

.Q. Now, what is not true about what I am talking about, Bent I just asked you a question of half drasseri boold the

A. Dr. Sharp-when I-Dr. Saper went out there to K. U. Medical Center to where I had been taking treatment, and he got a statement from Dr. Morris saying that I wasn't able to work, and just a couple days before then Dr. Morris had wrote a letter to the union stating that I was

able to work on July, on the last day of July, 1960, Dr. Morris wrote a letter to the union stating that I was able to work half nov t'and branch the Minter that the thirt alle

Q. My question was this of anolo a job of ann suit rol.

A. Just about August the first, August the third, Sharp and Dr. Saper went out to the K. U. Medical Center and got Dr. Morris to write this other letter saying that I wasn't able to work. That was the henest truthing tank aslo whool

Mr. Panethiere: I object to the answer, Your Honor.
The Court: Sustained. been going shots with your a long time, he says

The by Mr. Parethiere without it should palou vie Joli

Q. At the second step meeting there was a medical re-Q. So the meeting adjourned at lairne Trong and road trop

A. Dr. Morris, Right of salat of guing saw wains out tant Q. In that report it was stated that in his opinion you were unable to work. Right!

A. His opinion.

Q. That was my whole question. The position of the union was that your blood pressure had improved and that you should be put on some kind of a job, isn't that what [fol. 88] they said? siter the second step?

A. After the second step!

A. No.

Q. Second step!

A. No, not no second step, no it is with a mis I .A.

Q. What did the union say in world bib ladw ba A. Q. A. Mr. Mooney did ask, "Can't you find no kind of work for this man to do!" meeting who was itlanuale

Q. Who said that?
A. Mr. Mooney, Mr. C. Mooney. He said no, no, so Mr. Mooney didn't say another—that was the onliest words that was said concerning me going back to work

Q. I hate to interrupt you but we are talking about a

second step.

A. I am talking about the second step.

Q. Mr. Mooney wasn't even present at the second step. A. Oh, yes, yes, sir, he was present at the second step. Q. And they were trying to get you a job, weren't they?

A. He did tell Mr. Sharp, he asked Mr. Sharp, he says,

"Mr. Sharp," he says, "Mr. Sharp, can't you find nothing for this man to do, a clean-up job, or nothing?" Mr. Sharp just told him no, he says, "No", he says, "as far as my concern," he says, "Ben and Swift and Company it through as far as my concern," he said, "maybe you can find somebody else that will put him back to work but I am't."

Q. After he told you that the union told-

A. Yes, Jamerson told me, he says, "Mr. Sharp, I have been going along with you a long time," he says, "I am [fol. 89] going to take it further." Mr. Sharp told Mr. Jamerson, "That's all", he said, "go on and take it further, if anybody else—"

Q. So the meeting adjourned with the understanding that the union was going to take it on to the third step, isn't

that rights

A. That's right.

Q. And shortly thereafter they did have a third step?

A. They said, as far as my concern I don't know nothing about it because I wasn't there.

Q. Did you have any discussion with any union members

after the second step!

A After the second step?

Q. Yes.

A. I am pretty sure I did.

Q. And what did they who did you talk to!

A Well, I talked to Mr. Jamerson and I talked to Manuel.

Q. You are talking about the president of the local, Mr.

A. That's right, Mr. Manuel Vaca.

Q. What did they tell you?

A. Well, they said, you know, they was going to try to do all they could for me, and so on.

Q All right. Now, were you informed that there was a

[sol 90] A He told me that they had the third step.

Q. Now who told you that? contrictens fould will not

A. Mr. Jamerson

Q. What did he tell you the results of that third step meeting were!

A. They didn't succeed.

Q. In other words, they were still at the same stage they were in the second step to Mr. Robett, they

A. That's right.

Q. What did Mr. Jamerson tell you about further processing your grievance?

A. The fourth step going to the fourth step.

Q. Going on to the fourth step. All right. Did you have some discussion with Mr. Jamerson and the union officials about further medical examination

A Further examination? time blad on blank I var this water and

Quere Luphoda

A. That was after the fourth step.

Q. Before the fourth step!

A. No. No. All the medical statements was in when the second when the second, second step came up, they all was in then booked thou

Q. Ben, you remember they notified you there was going to be a fourth step! O. And as a result of those medica

A. The fourth step.

Q. Yes, and you were present, were you not?

A. In the fourth step.

A. At the President Hotel.

Q. Who was present at that meeting, who was there! [fol 91] A. Mr. Kobett and his friend, I don't know his name, Mr. C. Mooney, Manuel Vaca, George Burton, George Burton and several more of them which I didn't even know.

Q. They had some people from Swift and Company from Chicago there, is that rights benefine fineb way . If W : O

Mr. Browne Excuse me. At the President Hotel to the Mr. Panethiere: The President Hotelling not man in the

A. That's right;

A. Yes.

That is the fourth meeting we are talking about?

A. That's right.

Q. Mr. Kobett was there!

Mr. Kobett was there.

Tell us what you remember generally of that meeting.

. Immonth of the track

A. Well, Mr. Kobett, they had a meeting before the superintendent of the plant, which his name was Mr. Burns, the superintendent of Switt and Company, but before Mr. Burns came in, we was in there, Mr. Kobett and his friend was in there, I don't know his name, and they discussed what should be done with me, all of them seemed to be pleased that I should go back to work, Mr. Kobett and Mr. Burns, Manuel Vaca and Leonard Jamerson, of course, Mr. Mooney didn't say I should go back and I shouldn't go back, he staved neutral.

Q. At that point the meeting was still in there plugging,

trying to get your job back, is that right!

A. That's right.

[fol. 92]. Q. And during, as the meeting progressed there were various medical records produced, weren't there!

A. Medical reports was produced, that's right.

Q. And as a result of those medical reports, the two parties couldn't get together and agree what to do with you, could they? In other words, Swift wouldn't put you back to work!

A. No, he wouldn't put me back to work.

Q And you still weren't satisfied with the medical re-I wash t satisfied their branch and alle to 10 101 ports!

name, Mr. C. Mooney, Mangel Vara.

Q. Wasn't satisfied!

Yes, I was satisfied I was well satisfied. They was the one that wasn't satisfied.

Q. Well, you don't understand my question, on the basis of the medical report Swift and Company were still unwilling to take you back foll depolar i out

A. That's right and mestion that east the thirds X. A.

Q. And you made some comment that you wanted further medical and the union agreed to let you pick a doctor, O. Mr. Owens, I haven't asked the onestion anov 1'nbib

A. No, sir, I didn't make any comment that I wanted further from no doctor, I was well satisfied, I figured if five or six dectors couldn't get me back to work, it wasn't no use going and getting no more to awa may to totach a daig

Q. What doctors are you talking about, now! ".flid add [fol 93] A. I am talking about that same doctor's stateidea, not mine, I was just only trying to go alone with stram

Q. You'are talking about these statements here the attach

me back to work because I wouldn't go along risusel Ir A. Q. Didn't the company say in that meeting that they wanted a complete examination and not just merely a blood reading!

A. Well, they had had a they will regardless of what he said

Q. Well, wasn't that the position that the company took at this fourth step meeting that they had complete medicals; three and four page medicals on you, isn't that right?

Mr. Browne: What was the taspagordon baresulTriAn

Q. Yes, didn't Dr. Morris's medical report read about three pages? Wasn't his about three pages long?

A. I remember a long sheet but they didn't use Dr. Morris's statement there in the President Hotel is out tad

Q. The union didn't that right that do you beg nev

A. The company didn't either because I didn't agree to it.

Q. Well, didn't the company state that these, they didn't consider these medical reports, that these were merely blood pressure readings and they wanted a complete ex-A. No, I didn't know nothing about Dr. Day't nothing

A. No, he didn't say nothing about that in I reseeff rd

Q. How did you happen to go to Dr. Dayles are 1 .0

A. Dr. Day Later the fourth stellar ing I .A.

Q. Yes, direct entranged and of or now bid. Q. A. I went there because the union told me to a never [fol. 94] heard of Dr. Day.

To Q Took to you recall & conversation sham now but . O

MA Nos sir, not with no Dr. Day. The union asked me

Q. Mr. Owens, I haven't asked the question yet. I night

be As O. Kisliam sorry: yas esaut fubil 1 , its al. A

Q. Don't you recall a conversation with Mr. Jamerson where you were dissatisfied and he said, "Mr. Owens, you pick a doctor of your own choosing and the union will foot the bill." Do you remember that conversation?

A. Well, that was their idea, not mine, that was their idea, not mine, I was just only trying to go along with them, that's all. They claimed that's how come they hadn't got me back to work because I wouldn't go along, I was trying to go along with these people.

Mr. Panethiere: Your Honor, I ask the answer be

The Court: It was not responsive to the question.

loot vBy Mr. Panethierestianet and tacti frame district

de Just answer the question. The protection and the point of the point of the protection of the protec

Mr. Browne: What was the question! I have forgotten.

By Mr. Panethiere t toods aid thas W faegag send;

Q. The point I was trying to establish, Mr. Owens, is that the union wanted more medical in order to try to help you get your job. Isn't that right? That's right, isn't it, Ben! They were trying to help you, weren't they?

[foli 95] "Q" Didn't they did you pick Dr. Day as the doctor to go to! betnew yell has equipper surrous pools

Q. I am talking about after the fourth step. woll of

A. I am talking about after the fourth step. all . All . A

Q. Did you go to Dr. Hesser after the fourth step!

[fol. 94] heard of Dr. Day.

O. Did you have some medical from Dr. Heasar after the fourth step!

A. I went to Dr. Hesser and I fold him, you know wanted to go through another examination with him, the union was requiring me to go to a doctor and get another, a real examination. Here's the words that Dr. Hesser told me, he told me, he says, "I can't myself," he says, "because I am not that type of doctor," he way, "I am a surgion doctor," he say, "I'm a surgeon doctor, but," he says, "I will pick you a good doctor." And so I let it go from there.

The Court: It will be received. "Tabiq and bib odw .Q

A. He picked Dr. Day.

A. He picked Dr. Day.
Q. All right. That answers my question. The union had nothing to do with picking Dr. Day, did they! It was a doctor that you selected as a result of, by a recommendation of a doctor in whom you had confidence ! I a inabnotell

A. That's right.

Q. Dr. Day is a recognized doctor who limits his practice to heart diseases, doesn't he relations [fol. 96] A. That's right and more wor mail well Q.

Q. All right. And the union representative went down there with you when you were examined!

A. That's right.

Q. And they paid the bill, didn't they tan Ill va

A. I guess they did, I didn't.

Q. And you were informed of the results of that examination, weren't you! Did they tell you what Dr. Day's report stated! her came up at severont [80:161]

A. Yes, I think Manuel-

Q. Manuel and Leonard showed you the report when they received it. I will ask you to read that. Do you need some glasses again 1

A. No, that's O. K. I am acquainted with it

(Defendant's Exhibit No. 18 marked for identification)

wanted to ce what they was talking about. I went to a man cathed Mr. Beek bin Old Tourth floor in the old Brotherhood the there on my own and tell that man that I want my

seculation in I say, "just it down in black and white and

Q. Did you have some modical fereithers was not bid. Q

Q. This is Dr. Day's report of February 6, '61.

Q That is the report he made as a result of examining you, you just saw him one time, right?

That's all, I just saw him one time.

The Court: You are offering that in evidence 1 1 981/80 Mr. Panethiere: Loffer it in evidence at this time, Your Honormort og ti jel I og bak "notheb boog a nev doig lliv

The Court: It will be received. Island and lith only .Q.

[fol. 97] (Defendant's Exhibit No. 18, so offered and received in evidence, is not included herein, but will be filed separately) of the separate of the second of the second research

(Defendant's Exhibit No. 18 was read to the jury by counsellett It was not co-pensive to the highestant . A Q. Dr. Day is a recognized doctor who limits his prac-

By Mr. Panethiere; and faseob sesses ib trand of soit

Q. Now, Ben, you remember the fourth step!

A. I remember the fourth step. there with you when you were examined?

By Mr. Panethiere about Mid edt bisg godt bat. De

Ry Mr. Panel

Q. What did you understand was the result of the fourth step meeting Bent

A. Understand at the fourth step meeting!

[fol. 98] Q. Yes.

daink Manuel A Well, they came up, the union was going I went through with that

Q. What do you mean, you went through with that!

A. I went through with the rehabilitation.

Q. You went through with the rehabilitation?

An Chat's right of I went through with it afterward I wanted to see what they was talking about, I went to a man called Mr. Beck on the fourth floor in the old Brotherhood

Building on Minnesots and asked him about this deal, this rehabilitation, the time they laid it down to me, I went and talked to a man called Mr. Beck and I talked to a lady out to the Kansas University concerning this rehabilitation. She says that was for people that was completely damaged.

Mr. Browne: Told her what?

A. Was completely, couldn't do nothing, blind people, people paralyzed, completely paralyzed, doud saitted .Q

By Mr. Panethiere:

A. Represental the heart assoc Q. My question was this, Mr. Owens, there was some discussion about sending you to the heart association funds

A. That's right. 1900, you had a conversationyounder

Q. But you don't remember the discussion about Social Security? A. What did I tell the union to

A. That come up later. at the strat schalen ht.On.

Q. When did it come ap laterfut religious tadt the A.

A. That come up, they had two going on at the same time, Mr. Mooney was representing was representing the rehabilitation, Manuel Vaca was representing Social Se-[fol. 99] curity. And here's what I told Vaca here's what I told was the next time van take the underwhoden I

Q. May I interrupt you just a minute! the six only of the case

O. All right: What was the nature of that di N.O. A.

Q. We are talking about one meeting though aren't we? Q. Yes.

A. One meeting.

Q. You are just saying they came up at different dines!

A. No. No. No. my social security wasn't mentioned in the fourth step meeting ont a or nov aket of zonos 3W". yes

Q. And you say Mr. Vaca was opposing social security!

A. He was representing social security. Here's what and also one of the company officials, he told, here's what he told me, he said, "Go ahead on up there and get your social security." Here's what I told him I said "O. K. put it down in black and white and sign it. "I say "I can't just walk up there on my own and tell that man that I want my social security." I say, "put it down in black and white and

Medical Center.

sign it, Swift and Company sign it, the union sign it, and I will go." I wasn't going to put myself in the middle.

Mr. Browne: Did they do it!

A. No, they didn't do it. They wouldn't sign nothing.

to the Kanaac Universi

hat come un later.

[fol. 100] saild By Mr. Panethiera: Missolamos. va if

Q. Getting back to the fourth step meeting when you left

Mr. Browner Told, ners whally was lau

that meeting what did you understand, Ben!

A. Represented the heart association will teach me how to work, could learn me, you know, learn me a trade, they going to give me some money, they going to give me some money.

Q. What did you tell the union at that meeting!

A. What did I tell the union!

Q. Yes.

A. At that particular time I didn't say anything.

Q. Have you ever had any discussion with any of the members of the union after that time? A repeat the monard saw son I long to the monard saw saw son I long to the monard saw son I long to the monard saw saw son I long to the monard saw son I long to the monard saw saw son I long to the monard saw son I long to the monard saw saw sa

[fol 101] Q. When was the next time that you talked to somebody about it?

A. Approximately about two weeks later.

Q. All right. What was the nature of that discussion?

A The nature of that discussion 1 3. 2614 83 918

Q. Yes.

A They said "We going to take you to the heart association." Well, I was under one heart association. They say, "We going to take you to a heart association." I say, "What heart association you going to take me to?" They didn't answer that, They said, "We also going to give you some money." Not all strains answer that

QuiWho ware you talking to talk on this on our blot pa

A. Lives talking to Mr. Manuel and Mr. Mooney.

And Mr. Mooneys All right. Were you already in one heart

Medical Center.

- Q. And you stated you had been treated out there!
- A. I have been treated out there we then the burks the
- Q. How long have you been treated out there!
- A. I have been treated out there off and on ever since '56.
- Q. That is for a heart condition, right that is and I deliver the state of the stat
- A. That's right began moment today voli thinks like Oto
- Q. You were in the cardiovascular section out there!

The Court: You must answer, please. and they would quarrel at me and they

[fol. 102] A. Yes. Thus he down hoos on an ob tabluos

By Mr. Panethiere:

Q. About two weeks after the fourth step meeting, which was November 16, 1960, you had a conversation with Mooney and Vacaton not begon anity of multiple week the Well, they said they was ..

dy sendedu (2901 frew birAF 6).

- A. That's right.
- Q. They were talking at that time about rehabilitation, is that right? rowner. You interrupted his misn
 - A. Rehabilitation.
- Q. Did you have any discussion with the union after that time1 thought he was through
 - A. Yes.
 - Q. When was the next time you talked to them?
- A. Well. I talked to them every week, every two weeks or, you know, like that.
- Q. Now, you remember that the meeting was November 16, 1960; syb blood preseure ven got.
 - A. That's right.
- Q. Prior to that time you had already engaged an attorney, hadn't you?
 - A. Yes, I had.
 - Q. When was the first time you talked to Mr. Brownet
 - A. When was the first time I talked to Mr. Browne
 - Q. Yes, about your discharge volates beding
- A. I believe it was somewhere along, approximately about October.
 - Q. Could it be as early as September?

A. It would have been sed bad nor beints usy but A. O

Q: And that was even before the fourth step had even been set and a date agreed upon, wasn't it! Now, were you fol 1081 unhappy with the union at that time!

A. I was unhappy with the union and a val at ladit of

Q. All right. For what reason were you unhappy with Lon were in the cardiovasculatemit tantota noing adt

A. Because they talked mean to me, I asked them things and they would quarrel at me and they told me that they couldn't do me no good, and so, and I was very displeased with them.

Q. And were they, at these various steps in the meetings, trying to get your job for you, up until the fourth step?

A Up to the fourth step 1 nov .0001 at rednesvo A as's

Q. Yes, were they trying to get you back to work then!

A. That's right.

A. Well, they said they was.

Q. All right. Now, who talked mean to you! Today .O

Mr. Browne: You interrupted his answer. He said they said they was but then you interrupted him. Now I would like the Court to permit him to finish his answer.

Mr. Panethiere: I thought he was through.

Q. When was the next time ye reintiere? A. Well, it talked to there every week every

Q. Go ahead.

was the natistant part work work not so A. They talked mean to me when I would go in there to talk to them, "I can't get you back to work with all that old high blood pressure you got," this doctor says so and so, Dr. sent a statement in there for one thing on it, they claimed that the doctor was wrong. torney hula byout

Q. Who!

A. Nesd badagar of subsy one mitein A. Mooney, Mannelus nov amit terd and sew month O.

A. When was that I said the I saw mon W. A.

A. It happened somewhere along, you know, around in [fol 104] August that's just about when things, you know, Were you aiready in maradule! got started.

Q. Basically, as Lunderstand white as and it blue?) Q.

As Well I was under the heart a sociation on to his Medical Center.

A. From January up to August nobody moved a hand. from January to April, the case was turned over to the union January the 11th, until August the 8th nobody turned A. It was somewhere in the meighborhood bat a brad s

Q. During that time is when you were getting these medical reports, was it. Ben, the union told you that in order to do you some good you were going to have to have some medical to back you up? Isn't that what they told you. Bent

A. Yes.

Q. That's absolutely right, wasn't it! at a regretted A.

A. Yes, that's what they told ment term ent a harf? Q

Q. Now, how many times have you talked to Mr. Vaca. was he elected president just about the time you were discharged wasn't he, or shortly before that! did on old .A

A. No Mr. Vaca didn't take his seat until July the first of 360, was that had now not be restant and built biss poy

Q. Of 60. You had already been terminated and larged

AdI was already terminated bloom if their stadil A

Q. Now, how many times did you talk to Mr. Vaca while

he was in the office?

A. Oh, I didn't see I talked to him several times, he was kind of hard, you know, for me to tell you just exactly how [fol 103] many times that I talked to him. A Share HA . O

Q. More than one time you talked to him to direct out rathe

A. Oh, yes. : gaithean gots dirugh add add A.

Q. It was always about your pending grievance!

A. That's right.

[fol. 107] Q. Now, you made the statement on direct examination something about Mr. Vaca mentioned \$300.00 when you were in the union hall there, when you mentioned going to the fifth step. I was I would be a sourced and

lind out or benieved

A. No, we wasn't in the union hall. "I tadw dound 1601 for

A. Out there on the, I was sitting out there on the rail when he came by and I asked him was he going to represent this case to the union hall, he said no-

Q Would that be just two weeks after the fourth step you are talking about now! When was it! I am trying to place the time, Mr. Owens tank liture, att Leather a jung for the

A. It was somewhere in the neighborhood but I keeps Q. During that there is when son were putting disbroper on

Qualities, sir, in the neighborhood of what?

[fol, 108] A. Maybe it was a week, maybe two weeks, could have been less, could have been more. and got shad of Instront

Q. tall right t quarrel at me and they talk me wall ales

A. Four years is a long time. Idan viets osds a tank . O

Q. That's the first time you saw Mr. Vaca after the fourth step. Was this the first time you talked to him after the fourth step meeting? trode dear devolvene better better

A. No. no. I think I talked to him before then saw hearale

Qa Well if I understood you correctly when I asked you you said that the first conversation you had with any union official was about two weeks after the fourth step meeting.

A. That's right. It could have been more could have bean less, west as I said, four years is a long time to rehe was in the office? member.

Q. No, I am saying about two weeks, more or less ! . . .

kind of hard, sou know, for me to tell you just exactly how Q. All right. And who was the first man you talked to after the fourth step meeting to not some son uselt erolf. ()

A. After the fourth step meeting?

Q. You have yether men mode sunvis sawate Que.

A. I walked in the hall- u back to wor thight what I A

Q. The union hallf on got, this dig or says and so

A: In the union hall-

O. All right.

And it was a bunch of them in there.

Mr. Browne: I didn't get the answer, "and it was a [fol. 109] bunch what!" Had noing off in I near ou . O. . A.

Mr. Panethiere: "bunch of them in there".

har add no oredt for galling sin I sal no green incl. h. when he came by and I asked him was he going to represent

By Mr. Panethiere: By Mr. Panethiere: By Mr. Panethiere:

Q. Do you recall who was present! Was Mr. Vaca there!

A. Mr. Vaca was thereit at not amit tank ast tunds ani-

Q. Mr. Jamerson there trand and turkle hadlat sund lend

A. Yes, Tknow Mr. Jamerson was there than take at a of

Q. How about Mr. Mooney, the gentleman tabib ! A

. O. You just let the matter drop, didn't without nAgo

Q. You don't remember whether he was there or not land

A. I think Mr. Mooney had gone back to work this I .A.

Q. And what was the nature of your conversation at that Q. Then was that the end of that meeting? Is that temit

A. When I walked in Mr. Vaca mentions, he says, "There is the man. I am really glad to see you?" som terit tout

Q. What else did he say fight doot mode tank tank on . A.

A. He says, "We want to take you to the heart association," he said, "the heart association." He say, "Whatever those doctors says," he says, "that's what that's what will be done."

Q. All right. Did you agree to go to the heart associa-Q. Now when is the next time you saw nottion!

A. No. I didn't tail and blot I but use V. TM tem 1.

Q. You refused to go; didn't you! That's what happened. wasn't it; Ben's I but remember our unlability gaw yest bus

A. Yes mond fing wolf The I remain down till for Q. All right. What was the rest of the conversation that first time now after the fourth step, what was the rest of the conversation?

A. They says that, told me of course, Mr. Mooney was [fol. 110] with me at that time, he stopped that conversa-(Answer rend by the reporter). tion there.

Mr. Browner Mr. who was theretone ! all stud ad ad Mr. Panethiere: Mooney with a language and analy

A. The next time I met-

The Court: I would like to recess now at at make the Court and the court My hereupon, the jury being duly althonished, an edjournment was taken until 3745 A.M., June 19, 1936 have see

Mr. Panethiore: Yes, sir.

do Well, let's see, about somewhere along about the first f. December as mear as I can represented.

Q. I am not falking about the next time. I am still talking about the first time, Ben. Is that all that was said this first time, talked about the heart association, you refused A. Yes, I know Mr. Jamerson was ther thigh tath at or of

A. I didn't refuse it right then mook in mode work of

Q. You just let the matter drop, didn't give them an Q. You don't remembet whether he was there or trewans

A. I didn't give them a direct answer, I didn't tell them I

would go dich't tell them I wouldn't go. and Indian it

Q. Then was that the end of that meeting! Is that what you say! Or did you have some further conversation at that first meeting! was of bally glad to see frait angul and the

A. No, that just about took right then:

Que That's all you talked about?

A. Chat's right H. " notheroza' has fait . Pay of " pho

Q. At that time you didn't say anything about the fifth. step, did you!

nAc No, not right then of berge nor bill half

Q. Now when is the next time you saw any-

A. I met Mr. Vaca and I told him that I wasn't satisfied that the heart you know, to go in to no heart association, and they was promising me money, and I asked him how [fol. 111] much money, I said, "How much money you going tourive me?" I says, "What you giving me money fer?" I said, "What do you give me," I say, "do you owe me any money ?"

Mr. Panethiere: I don't understand.

(Answer read by the reporter)

The Court: Mr. Panetkiere, I do not like to interrupt your cross-examination, I assume you have some more.

Mr. Panethiere: Yes, sir.

the next timed Land The Court: I would like to recess now

Whereupon, the jury being duly admonished, an adjournment was taken until 9:45 A.M., June 19, 1964.)

[fol. 112] Friday, June 19, 1964 rd ent trodA. O

Morning Session was heaving and under

Mr. Panethiere: Your Honor, another named defendant Manuel Vaca, was unable to be here yesterday, but he is present in the courtroom this morning now denneld .TM .O

What way the mature of your convenience Verilly feet

. Q. Where was this convergetion holds it as one W. Q. BENJAMIN OWENS resumed the stand of the same tail B. A.

[fol. 114] Cross examination (continued), and W tage of

aidt bin By Mr. Panethiere: inglie ingeleingen ingelein brad

Q. Mr. Owens, when we adjourned vesterday we were at the point after the fourth step meeting. You said approve mately two weeks later you first contacted Mr. Vaca with reference to your grievance, is that correct?

- A. That's correct cose (to rear is the stress to not ment to
- Q. You will have to answer.
- An Yes. of the encircular vice even move by 100 hi can to Other
- Q. What was the nature of your conversation with Mr. Vace at the first meeting after the fourth step and W .Q
- A. The conversation between me and Mr. Vaca, he was still talking about this rehabilitation is the are in some A. A.

Mr. Browne: A little louder, please. word nov of .0

middle or the instruert A. He was still talking about rehabilitation and this heart association deal that they had going o albord od? O

ing take place. Mr. Dishart especies agree and By Mr. Panethiere it found Mr. Manuel & 1911 los

- Q. Now, this was probably sometime in November of
 - Q. All right, you approached him High what ger A.
- Q And when is the next time you contacted Mr. Vaca or any member of the union with reference to your
- A. Well, let's see, about, somewhere along about the first of December as near as I can remember.

Q. About the first of December of 1960

A. Yes.

Q. And who did you talk to

Ifol 1151 A. Well I talked to Mr. Jamerson and I talked danted Vices, was unable to he here vesterdiagnal an of

Q. Mr. Manuel, you mean Mr. Vaca here (indicating)

(fol: 112)

A. Mr. Vaca.

Q. Where was this conversation held?

A. That was in the union hall, it was a round, round table discussion.

Q. And what was the nature of that discussion, Mr.

Owens! What did you talk about?

A. Well, still talking about the rehabilitation and this here—the heart association.

Q. And did you ever, at that time you hadn't requested going on to the fifth step yet, had your and sall rella mion salt

match two weeks later you first contacted Mr. Vool An

Q. I see. Now, did you have a meeting with any members of the union after the first part of December, 19601. O. You will have to answer our

A. 19611

Q. Yes, in '61 did you have any discussions with them?

Q. When was that approximately as near as you can remember

A. Somewhere along about in January.

Q. Do you know whether it was the first part of the middle or the last partf:

All It was probably along the middle at line asw oll .A

Q. The middle of January, 1961. Where did that meeting take place, Mr. Owens?

[fol. 116] A. I met Mr. Manuel out, I was out there sitting on the rail out there between the second house and the union hall, and when I when I approached him.

Q. All right, you approached him and what was the nature of your conversation or discussion! What did you

A Well, we talked about not the next time that I talked to him, him and Mr. Mooney was going in together H. A.

of December as near as I can remember.

A. In to the union ballist in the safety was a server windy death

A. No, they was off at lunch, they was leaving the union hall and they was going back to work and I approached out. there in the front ... It in a particular which revended to fare a

Q. Mr. Mooney and Mr. Vaca here (indicating) 1/4 .A.

Q. Going back a little make Merither Shound and Quioti Q.

Q. What was the nature of your conversation at that timet. World you tell it invokes ruoy salat of eriseb ton bib

A. Well, they got on me about this here heart associajust about between the fact of January or the first alegs noit

Q. They got on to you about it! Hope you in an apour as yes

A. Yes. That was the nature of the case. 10110 . work

Q. New, even at that late stage you still hadn't been talking about the fifth step, you were still talking about rehabilitation, weren't you?

A. Yes.

Q. Isn't it a fact that there had been appointments made for you to go to the rehabilitation center for an interview [fol. 117] and that you failed to keep those appointments?

A. They never did make no appointments.

Q. You are testifying there was never any appointments made for you?

A. There was no appointment made.

Q. Either to go to social security, heart association or rehabilitation?

A. Not no directly appointment.

Q. What do you mean by-

A. They never set no date to me how we was going or when we was going or so on.

Q. But there was some discussion about it?

ANY ANTHURS AND ASK

Q. Now, when is the first time after the middle of January, '61 that you indicated to the union that you desired to go to the fifth step?

A. That run along somewhere along in about the last of Januaryadinoni neve inconta tant

Q. The last of January. Now, one point after the fourth step isn't it a fact, Mr. Owens, that you told Mr. Vaca here in about two months and a bail.

that you were very pleased on the efforts they were making on your behalf tow yell degral to he and ent of L To A. No, sir. No, sir. Jane of word gaing age, and handled

Q. You never made that statement !

A. No, sir. No, sir. and and The pas venour

Q. Going back a little now, Mr. Owens-when were you [fol. 118] informed or when did you learn that the union did not desire to take your krievance to the fifth step!

A. As near as I can remember it was somewhere along just about between the last of January or the first of Febru-

ary as near as in my recollection.

Q. Now, prior to the time that you learned that, you had already filed suit against Swift and Company, hadn't you?

A. That's right.

[fol. 119] Q. All right. But that suit against the company is still pending, isn't it? That has never been disposed of?

A. As far as I know

Q. Now, going back, Mr. Owens, you stated on direct examination when we first started, when you first took the stand here, that-I am quoting your exact words, I think, as near as I could take them down, "I am a high blood pressure patient". Do you remember saying that?

A. I have had it all my life, born with it.

Q. And you also said at the same time, "I just have to take it easy." Do you remember saying that?

A. I have to take it as easy as I can.

Q. All right. But then on the other hand you testified that you took off on May 23rd of 1959 and you were thereafter off work about twenty-six, twenty-seven weeks, weren't you?

A. They made me stay off that long. I wasn't off that long but the doctor just wouldn't let me come back in there.

Q. I say you were actually off work that leng!

A. That's right, I was off just about seven months.

Q: For physical reasons?

A. What they said but my doctor didn't say so, my doctor sent me back there in about two months and a half.

-necount of the same deal.

· these organizations!

[fol. 120] Mr. Panethiere: I move the answer be stricken as not responsive to the question. - 1900 nov sonia insurvoig

Mr. Browne: That's objected to. We feel that that is responsive because he asked him about it and he gave a complete answer. I amake of to have acted got Hill O

The Court: That will be stricken.

Ifol 1251 leager then Moralgy and P got turned down on By Mr. Panethiere:

Q. Mr. Owens, on direct examination you testified that immediately prior to May 23, 1959 that you became exhausted, that you had been working twelve, thirteen and fourteen hours a day, is that correct?

A. Yes, I was feeling awfully bad.

Q. In fact, you were a prefty sick man, weren't you, Ben! A. Well, I wasn't in bed, I was still going, I could have worked on but I didn't see no sense in going on killing myself unless I had to.

Q. How long had you been werking that overtime twelve

and fourteen hours a day just prior to May 23rd?

A. Just prior! Off and on ever since I been down there the whole sixteen years, off and on, I said.

. Ha aded av

[fol. 122] Q. It is possible then that your statement that you worked twelve, thirteen and fourteen hours might be

incorrect, is that what you are saying, Benny!

A. I know we worked long hours at that time. Sometimes we worked as low as four hours, we worked all the way from four to fourteen. I am telling you like it is. I didn't say every week or every day so long. The say such the delivery bedeen

Q. Didn't you say that the reason that you took off work

was because you were exhausted from now home and we

A. I was exhausted and I felt bad. I would probably. have been feeling the same way if I wasn't doing nothing.

Q. So your work had nothing to do with it, is that what

you are saying!

A. I said probably, I do feel bad at times when I am not doing a thing. When a man is sick he's just sick.

[fol. 124] Q. Have you made any applications for employment since you were terminated by Swift and Company!

A. Sure I have made application for employment.

. Q. Will you tell us some of the places you have applied?

A. I just made that application over here on the river no [fol. 125] longer than Monday and I got turned down on account of the same deal.

Q. You say you got turned down on account of the same deal. Was that because of your physical condition? Was that the reason they gave you?

A. I can't give sufficient reference-I mean reference.

Q. Have you made application and taken any physical examinations in connection with going to work for anyone?

A. I don't try, to be honest with you, I don't try.

Q. What you are saying, Mr. Owens, is that you know that you can't pass the physical examination?

A. No, no, not from no new men, no.

Q. Pardon me!

A. Not from no new people, I wouldn't expect them to and I wouldn't blame them.

Mr. Panethiere: I believe that's all.

Redirect examination.

By Mr. Browne:

Q. Just a few questions in response to those brought out by counsel. He mentions that, passing this thing, asking about your getting in trouble after you were laid off, but he mentions your not passing a physical examination. Now or any time singe you were laid off there, you have done this, lifting these heavy sacks—

That's right.

Q. for long hours, have you!

A. That's right.

[fol. 126] Q. And are you in better shape now-

Mr. Panethiere: Your Honor, I object to the form of these questions,—

A All Physicalical A

vou what kind of sport

and so forth and cetters which

By Mr. Browne: / tylinoisynin paper 1,014 . Ge.

Q. -or worse-

Mr. Panethiere: —leading and suggestive of feel 1

Mr. Browne: I haven't even finished yet, and animal O.

The Court: The objection is overruled.

By Mr. Browne;

Q. Are you in better shape or worse, better shape or worse now than when you laid off because you were so tired after working those long hours?

Mr. Panethiere: Well, Your Honor, counsel is testifying.

nonof By Mr. Browne: mi said of a susai this of instruighti

Q. Just tell whether you are in better shape or worse

now than you were before you were laid off!

A. Yes, I would say so. Also, you know I am five years older than the time now when these people laid me off, I am five years older and I have worked all five of them some place, doing something, there is no way in the world I could take care of my wife and two kids and just sit around and not do nothing.

Q. Let me ask you this. This company doctor that said there was nothing for you to do but to go home and lie in

bed and wait till you die-

A. Well, he didn't say wait till I die. He spoke it like this, he says, "I tell you what you do, just as fast as you [fol. 127] can," he says, "You go home and get in bed and stay there and live your life out," I says, "Who going to pay my gas, lights, rent and groceries for the kids, keep the kids in school, and so on while I am laying there living my life out?" It would be very—life wouldn't be there long, you can believe that.

Q. And not following his advice, you wound up four

years later in what kind of shape to the available

A. I wind up two years later, I lose two homes, I lost a new car.

Q. No, I mean physically?

A. Physically

Q. How do you feel?

A. I feel fine wite and a had guibed-

Q. During these years when you worked for the packinghouse sixteen years and were building up your seniority and so forth and getting near retirement time. I will ask you what kind of sports you engaged in, even though you had this heart murmur from birth, what kind of sports did you engage in the same and the second read of the same and the same an

A. Well, I played ball-

Mr. Panethiere: Your Honor-I have tried not to object to this line of questioning but it is immaterial and irrelevant to the issues we have in this case. Your Honor, what his physical condition is, that has nothing to do with the issue in the case here, Your Honor. The issue is not whether or not he is physically able or not but whether or [fol. 128] not the union actually was in good faith in processing his grievance.

Mr. Browne: Whether he was in good condition shows

whether they acted in good faith or not.

The Court: Overruled.

of the sending of the court of and had an end in

Mr. /Panethence Your

Q. What did you do, now?

A. I played ball, I didn't play in no leagues or nothing like that, we go around in the parks and we play ball.

- -- oth poy the tiest bas bod

Q. What kind of ball did you play?

A. Well, it was soft ball, no baseball.

Q. What position did you play!

A. Well, I catch and play the field.

Q. Run the bases when you are lucky enough to get a ted evelod near nov hit?

these questions.

A Yes pane we has been bed been aniwollor lon but. O Q. Did you have any trouble with your heart or any other part of your body and be to I want when to when the to the A. Didn't have a bit. I'd run races and get out and see, you know, how far I could run, or try, you know, like I used to do years ago. Of course, I can't run as far and I can't trot as far now as I did years ago, of course.

[fol. 129]

Recross examination.

ion bias l'ain usia de

By Mr. Panethiere: "O' TRID oil slat

Q. Ben, I can't understand, you say you took off in May of 1959 because you were feeling bad, you were a sick man, weren't you, in '59!

A. Is there any difference in feeling bad and sick!

Q. Well, is the fact that you took off for approximately six months—

A. I didn't take off no six months, I was off about two months and a half and the doctor wouldn't honestly let me come back.

Q. All right, but you were under medical care at that time, weren't you?

A. I was under medical care as far as that's concerned I have been under it ever since 1956.

Q. And when you did return to work the company doctor was the one that wouldn't let you return, is that right?

A. That's right, the company doctor was the one that wouldn't let me return, nobody but the company doctor.

Q. And the whole matter of the grievance and all the steps had to do with your physical condition, didn't it?

A. That was their job to take care of it. I couldn't do it.

[fol. 134] Q. Do you remember Dr. Day telling you that he couldn't predict life

A. (Witness shakes head)

Q. Wait a minute. I haven't even asked the question yet,
My. Owens.

Mr. Browne: I object to counsel calling down the witness. The Court: Proceed.

By Mr. Panethiere: anun hit hit a avad Fushi.

Q. You don't remember anything Dr. Day told you! [fol. 135] A. Dr. Day ain't opened his mouth to me. Believe me, that man ain't opened his mouth to me. He talked to you all, not me. The man ain't said nothing to me. I went in there for the examination, me and Mr. Jamerson and I went, his secretary, his secretary, his nurse, she first, she says, "Is this the man you brought in for examination?" He says, "Yes."

Q. My question is this. Dr. Day didn't talk to you at all?

A. He said not one single word to me, no more than his

Q. Did he talk to Mr. Jamerson in your presence?

A. Not in my presence.

Q. He didn't?

A. Mr. Jamerson told me about two weeks later that he asked the doctor was I going to live, was there a chance for me to live, and he said Dr. Day told him no, that I didn't have a chance in the world to live. That's been four years, I'm still living.

Q. Now, he said he couldn't predict if you kept on in the

same occupation, isn't that what he said, Ben!

A. Same occupation!

Q. Yes, if you continued your job at Swift and Company,

he couldn't make any prediction?

A. What's the difference in Swift job and any other old hard job!

[fol. 137] Q. Weren't you charged with the responsibility of making different cuts on the meat different times?

A At different times!

Q. Yes, didn't you have to cut some of the meat?

A. Yes, I had, I trimmed loins up for them about, about fifteen years.

A The Court: Propert

[fol. 138] Q. And that's what they call a cutter, isn't it?

A. Yes, I was classed as a trimmer.

Q. And where would you do this trimming when you were trimming? Were you in a room, in a cooler?

A. Yes, in the cooler.

Q. Did you work by yourself or were there other people Mr. Panethieres Nour Hener, Lobject resettieres

A. Well, there was other people there. James has Janvely

Q. Doing that work what kind of tool or instrument do you use?

A. I had to have a knife and a hook and a steel, you know,

tools like that, to keep my knives sharp.

Q. Do you remember in the grievance steps that all was brought out, what kind of dangerous situation that would be with a man with heart condition, wasn't it!

A. I understand.

Q. You were there, weren't you! You remember that, don't you? rewest thou it sumb tits one adoi

A. Remember what?

Q. That it was dangerous to yourself and to the men around there for a man with a heart condition to work in there, isn't that what they said, Ben!

A. Is it a possibility they have other jobs so I didn't

have to use knives-

Q. That isn't my question, Ben. My question is, isn't that what they were discussing and wasn't that one of the topics [fol. 139] in all of these grievance meetings?

A. I heard Mr. Sharp state that.

Mr. Panethiere: I have nothing further.

A. I ain't heard a union man say anything

Redirect examination. 701, ni pandi ono bearin I Q

examination here I took you from the fourth garage meeting and all the conversations you is a world and the took the took

Q. Whatever heart condition you had; you had for sixpened, but on direct examinat your animate there anyway, hadn't your animate there's

Mr. Panethiere: Your Honor, I object to that The Court: Sustained. . A. Out in the frent.

way a By Mr. Browne: at oh nov bluew anedw bar.

Q. I will ask you what kind of heavy work you have done around your home since 1960!

Mr. Panethiere: Your Honor, I object to that as ir-

The Court: Overruled.

By Mr. Browne:

Q. That means to answer.

A. I have done everything there such as roofing my house and putting in windows, putting in doors, taking care of the yard, putting concrete gutterings around my house to keep the water from washing the foundations out, and so on, and on top of it I also contract those kind of jobs and still doing it today, the way I make my living.

Q. Have you done any work on trees?

A. Yes, trimmed trees, and hand, you know, trim trees, cut yards.

Q. You climb trees to do that?

A. That's right.

[fol. 140] Q. At Swifts did you get time and a half for overtime?

A. Yes, they paid time and a half for overtime.

Mr. Browne: That's all. sedi atata trisde and bright

Recross examination.

By Mr. Panethiere:

Q. I missed one thing in my notes here. Ben, on cross-examination here I took you from the fourth step meeting and all the conversations you have had with the union people, and you enumerated as near as you could what happened, but on direct examination you mentioned something about three hundred dollars. Now, where did that take place! Where did that happen!

A. Out in the front.

By Mr. Panethiere: hand distributed of Ward

Q. Tell us about the three hundred dollars, Mr. Owens. A. The three hundred dollars, when I come to be dis-

satisfied with this heart deal.

[fol. 141] Q. When did you become—

Mr. Browne: We object to interrupting the answer.

O And you are familiar with t

you are a union member?

By Mr. Panethiere:

Q. When did you become dissatisfied med! to omo? A

A. I went and checked, I went out there to the Kansas University and I told them the deal they was giving me down there about the heart association, he said. "What about the heart association?" I said, "They are supposed to take me to the heart association," I said, "they are supposed to pay me some money and," I said, "they are supposed to rehabilitate me for another job," and so on. He said, "Yes, there is such thing as that all right enough but," he said. "as far as the money is concerned we never heard of it."

Q. Now, when was this that you became dissatisfied,

about what month, what year ovidupes went thou house

A. '61, around about the last of January or first of February, sai ent elat vedt fon ig radeder wond fund it

Q. Of 1961 All right. You became dissatisfied, then you went-who did you talk to when this three hundred dollar thing came up that you mentioned?

A. I talked to Mr. Manuel & tadt. wond roof 19

Q. Mr. Vaca herefor tail To saw stallob berbaun seral

A. That's right. . nonstitudes add of fe you of balt .A.

Q. You say that was where? Where did that conversation take place? o the arbetrarion.

A. It was out in the front, he was going to work and I stopped him, you know, asked him was he going to represent me through this here fifth step. He said, "No." he [fol. 142] says, "we have got no money but," he says, "if you have got three hundred dollars that you can let me have," he says, "maybe we can do something about it."

Q. Who was with him?

A. Wasn't anyone with him.

Q. He was by himself? Have you read the union contract?

By Mr. Postathiers:

A. Yes.

Q. Particularly the grievance procedure!

A. Some parts of it, yes. 1 o. Doude of the sawers!

Q. And you are familiar with the union rules? You say you are a union member?

A. Some of them I am familiar with and some of them

I am not sit of enach institute U. berbede his from & . Lo.

Q. And do you know by what authority a case is taken from the fourth step to the fifth step?

A. What to show you want I've doos for tout shows it was

Q. Who makes the decision to take it from the fourth step to the fifth step!

A. The representative or the steward, or somebody.

Q. Have you ever heard of the executive board?

A: The executive board1 ingoing at voneya att ag yat ag

Q. The executive board. They have one there at the union, don't they, executive board?

A. I don't know whether they do or not.

Q. You don't know whether or not they take the majority vote of the executive board to take a case from the fourth step to arbitration!

[fol. 143] A. No.

Q. You don't know that. What did you understand this three hundred dollars was for, that you mentioned?

A. Had to pay it to the arbitration.

Q. Had to pay it to who!

A. To the arbitration.

Q. To the arbitrator!

HILLIAME:

A. Yest series, at key wild believe word to a last long to a

Q. In other words, the three hundred dollars you say was to pay the arbitrator!

devel to ears, "maybe we can'to smorthing heart" area

A. Yes, he said that's what it took.

E. - (besseze-gaogn W.)

Q. In other words, he said it would cost three hundred dollars;

A. That's right. rome and a mars and cooks carolis last

Q. He wasn't demanding the money for himself, was he!

Mr. Browne: That is objected to, calling for a conclusion. That is for the jury to decide.

The Court: Ask him what was said. Sustained.

Mr. Panethiere: All right.

By Mr. Panethiere:

Q. Now, are you familiar with the contract provisions on how arbitrators are paid?

A. No, I ain't.

- Q. What did you tell him about the, when he said he wanted three hundred dollars!
 - A. I told him I didn't have any three hundred dollars.
- Q. Did he tell you at any time, or did he mention to you that the union's position was that they had done all they could and that they didn't think your grievance had any [fol. 144] merit?
- A. Union had done all they could? You say did he tell me that at any time?

Q. Yes.

A. Norma and riditar on sink as welling a Thinkele sail T. S.

Q. He never did tell you that?

A. No.

Q. Did he ever tell you that they felt the union's position was that the grievance was not arbitrable because in their opinion it didn't have merit?

ch was marin that the attachmetab adt teniage

A. What you mean by the merits?

Q. That they thought they couldn't win it. Did they tell you they couldn't win the case in arbitration?

A. Yes, I do remember telling me that.

Q. They told you that on numerous occasions, didn't they?

that any actions on the part of these defendants were arbitrary, natiolous, wrongful, capricious, wanton or unlawful.

A. I remember him telling me that one time.

4

Q. Was that before or after the alleged three hundred dollars!

A. Along about the same, along somewhere along about the same time.

[fol. 145] Mr. Panethiere: Nothing further. Mr. Browne: All right. Thank you, Benny.

(Witness excused)

[fol. 147] Mr. Browne: Plaintiff rests.

[fol. 148]

DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE

Come now the defendants, and each of them, and move the court to instruct the jury that upon the pleadings and evidence adduced their verdict shall be in favor of the defendants and against the plaintiff for the following reasons;

- 1. That plaintiff's evidence fails to establish any cause of action against these defendants.
- 2. That plaintiff's evidence fails to establish a claim upon which relief can be granted in favor of the plaintiff and against the defendants.
- 3. That plaintiff's evidence does not establish or show any mandatory duty to carry plaintiff's grievance to the fifth step.
- 4. That plaintiff's evidence does not establish or show that defendant's refusal to carry plaintiff's grievance to the fifth step was discriminatory, malicious, or done in bad faith.
- 5. That plaintiff's evidence does not establish or show that any actions on the part of these defendants were arbitrary, malicious, wrongful, capricious, wanton or unlawful.

- 6. That plaintiff's evidence does establish and show that there are five steps to the arbitration procedure which was referred to in plaintiff's petition and his evidence, and that the plaintiff refused to cooperate and sought legal counsel [fol. 148a] prior to the fourth step; that as a consequence thereof the plaintiff failed to exhaust his internal and contractual remedies and this action is therefore prohibited and barred, and this court does not have jurisdiction over the subject matter of plaintiff's alleged cause of action herein.
- 7. That plaintiff's evidence shows and establishes that the essence of plaintiff's cause of action is arguably and basically an allegedly unfair labor practice under the Labor Management Relations Act, as amended, 29 U.S.C. S151 et seq., and especially 29 U.S.C. S158 (b) (1) (A), and as a direct consequence thereof the jurisdiction of the courts of this state over the subject matter of this alleged cause of action is therefore pre-empted and prohibited, and that the exclusive, primary jurisdiction over this alleged cause is properly vested in the National Labor Relations Board, if at all.
- 8. That plaintiff's evidence shows and establishes that the alleged wrongful conduct on the part of these defendants arose, if at all, on January 8, 1960, and that plaintiff did not pursue his alleged cause of action until February 13, 1962, which was more than two years subsequent to the date of the alleged conduct and as a direct consequence thereof is barred under the appropriate statute of limitations of the state of Kansas.

Q. U a want in the plant had it grievance of felt some

with Will wind

(Filed June 19, 1964)

The Court: Overruled.

[fol. 149] DEFENDANT'S EVIDENCE

LEONARD L. JAMERSON Was duly sworn:

Direct examination.

By Mr. Panethiere:

Q. Will you state your name, please?

A. Leonard L. Jamerson.

Q. Where do you live, Mr. Jamerson?

A. 3214 Olive.

Q. Kansas City, Missouri?

A. Yes.

Q. Where are you employed?

A. Swift and Company.

Q. How long have you been employed there?

A. Thirteen years and six months.

Q. Were you a business representative when a grievance arose in connection with Benjamin Owens?

TOOLE SHOUSE IN

A. Yes, I was.

Q. You are familiar with that grievance?

A. Yes, I am.

Q. You know Mr. Owens, do you not?

A. Yes, I do.

Q. Can you tell us what is the first knowledge you had of

[fol. 150] the grievance of Benjamin Owens?

A. The first knowledge of Benjamin Owens that came to me, it was in May, what date in May I don't know but that was in. I think it was in '60 or '61, one of those years, and he brought the doctor's statement to me and I think the first doctor's statement was from Dr. Alexander, and, you know, as things go, you look at it and see what you are going to do. So I got his doctor's statement.

Q. Well, what were your duties as representative,

Leonard?

A. To file grievance cases.

Q. If a man in the plant had a grievance or felt something was wrong, he would come to you, is that correct?

A. Yes, he would come to me.

Q. Then what would you do with the grievance!

A. I would take it first and I would go to the—well, I can go to the foreman or either the superintendent, I mean the business superintendent, and ask them what's the reason why the man can't come back to work, and he'll tell me why, then I will bring the aggrieved party with me, or he don't have to come with me but I'd like for him to be with me, and the steward be with me too, so after we get that all straightened up and everything, then if the aggrieved party is not satisfied what's going on, you know—

Q. Just explain it the best you can:

[fol. 151] A. So what I done then, I take it out to the union hall and we'll write it up. That was the first time I ever written, Ben Owens.

Q. You wrote the grievance for Ben Owens!

A. Yes, we write under certain paragraph why the man—why we feel like the man should come back to work, or like that, that's in order to get it going because you don't know what you got until we get into it, see, so—

Q. What happens to it after the grievance is filed?

A. I get a copy, the company get a copy and the union get a copy.

Q. Then thereafter follow the grievance procedure set forth in the contract?

A. That's right.

Q. That's what you call the five step procedure?

A. Yes, start on those steps right there.

Q. And after Mr. Owens's grievance was written up, what happened to it?

A. The second step, we take it then to the second step, you know.

Q. Were you present when the second step meeting was held?

A. Oh, yes, yes, yes.

Q. Do you recall who else was present?

A. Oh, boy. Now, I know Sharp was there.

Q. Who!

A. Ernie Sharp, he was there, I was there, the steward was there, yes, the steward was there.

[fol. 152] Q. Mr. Jamerson, I can't find the exhibit. You recall being present at that meeting?

Torrest Anne Way of Sil

A. Oh, yes, I was there.

Q. What was the union's position with reference to Ben Owens's grievance?

A. As I say, I am not—I just can't say I am going to try to say word for word, it's been so long ago.

Q. The best you recall.

A. Well, I sit down and I talk, you know, I mean I just

tell the company how I feel about it.

Q. Well, how did you feel about Ben Owens's grievance?

A. Well, the way I felt about it was like this, that the doctor's statement that was first brought to me, you know, to be seen, it didn't say nothing about going back to work or anything like that. That's what we were—when the first statement came, it was about—it was about his heart, if I am not mistaken, that was the first thing that was about his heart, it was high blood pressure, high blood pressure, went out with high blood pressure, came back in, his high blood pressure was supposed to be down to a certain degree, see, so this doctor's statement—

Q. Well, Leonard, my question is this. The union was representing Mr. Owens at the second step, wasn't it?

A. That's right. That's right.

Sharm yas there is

thing was wrong, he would come but

[fol. 153] Q. And what was the company saying?

A. The company was refusing him to come back to work.

Q. And what was the union trying to do?

A. Get him back to work.

Q. All right. And what position was the company taking? What were they saying the reason Ben should go back to work?

A. You mean what was the company saying why Ben should go back to work?

MORN LIND

Q. What was the union saying why he should be put back to work?

A. I was just saying he should be put back to work because I just felt like the man should go back to work, that's the way I felt about it, because like I say, I am no doctor or nothing, I was just going by the report that was brought in to me.

Q. Now, Mr. Jamerson, I hand you what has been marked for identification as Plaintiff's exhibits 1 and 3. Do those

look familiar to you, or copies of those?

A. Yes, I remember this one here (indicating). I remember this one (indicating).

Mr. Browne: Just for the record, he is pointing to Dr. Alexander's dated 5-19-'60, Exhibit 1. O.K.?
Mr. Panethiere: One.

A. I don't remember all of those. I recognize this one (indicating). I remember this one (indicating).

[fol. 154] By Mr. Panethiere:

Q. You are talking about Dr. Hesser's report?

Mr. Browne: That would be-

Mr. Panethiere: March 30-

Mr. Browne: March-

Mr. Panethiere: March 24, 1960.

Mr. Browne: March 24, 1960, Exhibit 3. O.K.

Mr. Panethiere: Your Honor, I think Mr. Browne will have an opportunity to cross-examine later on.

Mr. Browne: Oh, all right. I thought maybe I could be helpful.

A. No.

By Mr. Panethiere:

Q. But on the basis of the medical that you remember that was presented—there were medical records presented both by the company and the union, weren't there?

A. Medical report by the company

Q. Didn't the company have some medical reports in connection with Ben Owens!

A. I think so. I think they had one, it didn't look good.

Q. All right. So what was the result of the second step meeting, after you had your discussions, what happened?

A. Well, I didn't like the way things were going so I said, "Well, O.K., I'm just going to file the third step." That's what I did.

[fol. 155] Q. You couldn't accomplish anything in the second step?

A. Didn't accomplish nothing.

Q. All right. And Mr. Mooney was present with you at the second step, wasn't he?

A. Let's see, now, I think it was the third step when they, when the vice-president, I think it was the third step.

Q. I hand you what has been marked as Defendants' Exhibit No. 17 and I will ask you to read that, Leonard.

A. Read out loud?

Q. No. Read it to yourself.

A. Yes, sir. I remember that.

Q. Those are the notes of the meeting of the second step, are they not?

A. Yes, sir, I remember that.

Q. Does that correctly reflect about what happened at the second step?

Mr. Browne: That is objected to as self-serving and hearsay. This is in the defendant's case now he is talking about, bolstering up his own testimony, testifying from hearsay.

Mr. Panethiere: Your Honor, it has been introduced.

The Court: Overruled.

By Mr. Panethiere:

Q. In other words, that's about what happened at the second step!

A. That's right. That's right in various edi ve dioc

[fol. 196] Q. Now, were you present at the third step meeting?

A. Yes, I was there on the third step.

Q. To make it short, about the same thing happened?

A. Same thing happened, that's right.

Q. Then it was decided to take it to the fourth step?

A. Then I wasn't satisfied there, I went back to the union hall and written up, you know, we have our meeting, then I make the recommendation that it be moved up to the fourth step and it was so it went up to the fourth step.

Q. Were you present at the fourth step meeting?

A. I was there at the fourth step.

- Q. After the fourth step meeting was completed, did you have some conversations with Mr. Owens about his grievance?
 - A. We always talked, all the time, talked all the time.
- Q. Now, do you recall going with Mr. Owens to see a Dr. Day!

A. Yes, in the Brotherhood Building.

Q. Brotherhood Building!

A. Yes.

Q. Can you tell us how that came about that you went with Mr. Owens over to see Dr. Day?

A. Yes, I remember that, I remember that good. I was working, the union called me out there, that they wanted me to go with Ben Owens to his doctor and before I even went into the union hall I done asked him what doctor we going to, "I am not going to tell you, I am not going to tell you, I am going to take you to this doctor here."

[fol. 157] Q. That's what Mr. Owens told you?

A. Yes, that's what he told me. All right. So I go to the union hall there and I tell the president what my purpose is and everything, I am going with Ben Owens, I didn't have no car myself so I went with Ben in his car up in the Brotherhood Building, I didn't know where I was going, that's true, I didn't know where I was going, so we goes in this building and goes up there to Dr. O'Day, Dr. O'Day, I told him who I was, I told him I was union

representative for our local, and everything, so he says, "O.K." So he told Ben, he said, "Go in that room in there", and he sat down and I sat down in his office. All right. The man come out then, this doctor.

Q. Did the doctor examine Ben Owens?

A. I assume he did because he went in this room back there in that examination room. He comes out and Ben Owens comes out—

Q. Who came out? Owens!

A. Doctor and Ben Owens, both of them came out. Ben was fastening his shirt up and everything so the doctor was standing in front of me and Ben Owens standing at the side of me and I just can't say the words the doctor told me, "This man is not able to work," he said, "I will help him to get some type of aid," or something like that, he said, "I will help him." I said, "Will you write that in a [fol. 158] letter in effect for the union?" He said, "Yes," he said, "Who shall I address it to?" I told him to address it to the union hall and myself, you know. So he written all that down, sealed it up and mailed it to the union hall. All right. Then we had our meeting. All right. The letter was opened up and—

Q. Let me interrupt you just a minute. You said you had your meeting. Now, what meeting are you referring to

theref we good stady cored to too our feeling point of all compliant

A. Our board meeting being of answo and the

Q. That's the executive board meeting?

A. Yes. for an

Q. How many men on the executive board?

A. Twelve—well, twelve representatives and the treasurer and the vice president and the president, let's see—wait a minute—the president, vice president, secretary, treasurer.

Q. That would be sixteen?

A. Sixteen, yes abib I maiblind boodradi/rid out an qui

Q All right. And you say at the board meeting this letter was opened of an another anished

A. It was opened there at the board meeting.

Q. It hadn't been opened prior to that the Warmen of the

A. No.

Q. All right. What happened at the board meeting when Dr. Day's letter was opened?

Mr. Browne: A question as a basis for objection. Was Mr. Benny Owens in the room during that time?

The Witness: Was he present? No. word now all

[fol. 159] Mr. Browne: Then we object to that, calling for hearsay.

The Court: Are you asking for the conversations!

Mr. Panethiere: No, just what transpired, Your Honor.

The Court: Overruled.

Mr. Browne: I suggest nothing could happen-

The Court: I will sustain it as to any conversations.

By Mr. Panethiere:

Q. Mr. Jamerson, I hand you what has been marked as Defendants' Exhibit 18 and ask you if that was the contents of the envelope that was opened at the board meeting? Is that the letter from Dr. Day?

A. Yes.

Q. Now, what is the date on that letter?

A. February 6, 1961.

Q. Now, after the letter was opened, was there some discussion as to Benny Owens' case, without relating the conversation, was there some discussion about Ben Owens?

A. Yes. Yes.

Q. All right. And what did the board decide to do about. Ben Owens?

Mr. Browne: Wait a minute, now, that would be calling for hearsay and we object to it, it was out of the presence of Benny Owens.

[fol. 160] Mr. Panethiere: All I am asking, Your Honor,

Mr. Browne: Unless it is some official record.

The Court: Your objection is it is not the best evidence?

Mr. Browne: Yes.

The Court: Well, ted of round become and lighted

Mr. Browne: Hearsay.

Mr. Panethiere: He can testify as to what the

The Court: If he knows. Overruled.

By Mr. Panethiere:

Q. Do you know what the board decided to do about Ben Owens? You were a member of the board, weren't you?

A. Yes. After we got through, after the letter, was all

read and everything, then-

Q. Not the conversation, I don't want the conversation.

What did they decide to do about Ben!

A. Well, after that, we had a, we had a meeting at the President Hotel then because we was talking about taking it to—let's see, wait a minute—I know we had a meeting at the President Hotel.

Q. That's the fourth step you are talking about?

A. The fourth step.

Q. I am talking about your executive board meeting when you opened this letter, Leonard.

Mr. Browne: We object to counsel trying to impeach his [fol. 161] own witness. He has already testified they held the fourth step at the President Hotel after that meeting.

The Court: Overruled.

Mr. Browne: Now counsel is trying to change that.

The Court: Overruled.

A. Well, we talked on, we talked on this letter, I tell you that. We talked on it.

By Mr. Panethiere:

Q. My question is simply this, Leonard. After you talked and had conversation back and forth, what did the executive board decide to do about the Ben Owens case! Did they decide to go to the fifth step!

Mr. Browne: Now, that's objected to as leading and suggestive,—

Mr. Browns Janet a

Mr. Panethiere: Your Honor,— Jady would rabile ved!

Mr. Browne: —putting the answer in the witness's mouth. The Court: Overruled.

By Mr. Panethiere:

Q. Let me ask one question, Mr. Jamerson, are you here under subpoena?

A. Yes, I am.

Q. You were contacted prior to this trial, were you not?

A. That's right.

Q. And asked, requested to be here, and you refused, didn't you? Q. Did von here was very

A. Yes, I did.

Mr. Browne: Now, we object to his impeaching his own [fol. 162] witness. government of no his dat of og o'T . A

Mr. Panethiere: Your Honor, I would like to qualify this man as a hostile witness.

Mr. Browne: No showing of that at all.

non ager it was seconded then we had n

The Court: Overruled at this time. I overruled the objection as to your last question. Mr. Penerburg Tou

A. Well, I tell you, we talked, and I made a motion that this case be sent to the fifth step. The Court: Overreled.

Mr. Panethiere: All right. I wollow you sham Until W

Mr. Browne: To which step?

A. Fifth step, I made a motion on that and it was seconded.

By Mr. Panethiere:

Q. It was seconded?

A. Yes, it was.

Q. Then what happened? What was the result and what did the board decide to do?

A. Then that's when they—they didn't know whether to take it or not because all these medicals and everything,

they didn't know what the outcome, see, because the—all that.

Mr. Panethiere: I am not asking for the conclusion.

Mr. Browne: Just a minute. We object to counsel interrupting the answer that way.

The Court: Overruled.

Mr. Panethiere: It was not responsive.

By Mr. Panethiere:

Q. Then you moved that they take it to the fifth step, and you had a second?

A. Yes.

[fol. 163] Q. Did you have a vote on it?

A. Oh, yes.

Q. What was the result of the vote, Mr. Jamerson!

A. To go, to take it on to the fifth step.

Q. At that meeting it was decided to take it to the fifth step!

Mr. Browne: He has already said yes. We object to counsel trying to get him to change it.

Mr. Panethiere: Your Honor, I object to interruption

The Court: Overruled.

A. When I made my motion, it was seconded.

By Mr. Panethiere:

Q. All right.

A. All right. Then after it was seconded then we had a discussion on it.

hour is shared Lights

Q. All right.

A. That's right.

Q. How many voted to take it the fifth step and how many voted against it, as you remember?

A. I-

Q. Did the majority vote to take it to the fifth step or vote against it?

A. I can't recall, I just can't recall.

Q. So you don't know To your knowledge was it ever taken to the fifth step!

A. No.

- Q. Now, after that meeting did you have any conversations with Ben Owens?
- A. Always had conversation with him because he come [fol. 164] over to the hall there and I talked with him.
- Q. Did you ever have any conversation with him about going to the heart association and applying for social security?

A. Yes, I talked to him about that.

Q. And you offered to help him, didn't you?

A. I offered to help him, that is right.

Q. Did you have any conversation with him after the fourth step and he thanked you and he said he thought you did all you could for him?

A. Yes, he did, he told me that, yes, he did.

Q. Did he ever express to you any dissatisfaction with the manner in which this case was handled?

A. He always told me I was his friend always.

Mr. Panethiere: Thank you. No further questions,

Cross examination.

By Mr. Browne:

Q. And you thought he was right, didn't you, Mr. Jamerson!

A. Thought Ben was right by telling me that?

Q. No, no, of course, by saying that, but I am talking about that he should have been taken to the fifth step to give him a chance to present his case, didn't you, you favored that, didn't you?

A. Yes, I was representing him.

Q. That's what I say.

A. I was representing him.

Q. Of course, that's the job of the union, isn't it, to try [fol. 165] to do the best they can for its members?

A. That's true.

Q. And especially against management? Isn't that why you have the labor union?

Liscall Linust cap't recall.

A. That's right.

Q. That's why you belong to one, isn't it, because you think that the men should have representation?

Mr. Panethiere: Just a minute. He hasn't answered your question yet.

A. I belong to the union because—

By Mr. Browne:

Q. To help the members?

Mr. Panethiere: Let him answer.

Mr. Browne: Be quiet.

A. Like I say, now coming up, the little statement Theodore Roosevelt said, be in a union—it's better to be in a union, in any union. I think that's what he said, that's why I joined the union because I know it's better to be in the union.

By Mr. Browne:

Q .. To help the working man, isn't that right?

A. That's what a union is for.

Q. Why, sure. And the union is not, in your view, to try to help the management, the company, but to help the working man, isn't that the purpose of it as far as you know?

A. Well, I say-

[fol. 166] Mr. Panethière: Your Honor, I object to the question as irrelevant and immaterial, highly improper.

The Court: It may be overruled.

By Mr. Browne:

Q. Isn't that it forms off to do out a fait seems W. D.

A. Well, a do the best they can for its months a tell W.A.

mid gails overeger.

Q. One of the main purposes, let's put it that way.

A. You work together, any union and company, they work together.

Q. Yes.

A. That's right.

Q. But when the two interests conflict, the union is supposed to help its own members, is that right?

A. That's right.

Q. So the interests of the company and the union, I mean the employes, do conflict lots of times, don't they?

A. That's right.

[fol. 169] Q. All right. Now, let me tell you—ask you if you didn't know as the union representative that the only step in which the company representative doesn't make the decisions is the fifth step? Right?

A. Say that again.

Q. The company representative makes the decision to put him back to work or not in every step except the fifth step, is that right?

[fol. 170] A. The fifth step is arbitration. Q. Yes, that's the only one where—

A. The arbitration decides what is final and binding.

Q. So the fifth step is the only step where a neutral person decides it, is that right?

A. That's true.

Q. All right. So actually the board or anybody else for the union as far as you know never decided that Benny Owens was supposed to pay three hundred dollars before you would go to the fifth step, you never heard of such a thing, as a board member, did you?

A. No, I don't remember nothing about that,

[fol. 171] Q. So you felt and so said to the board that he should be put back to work and that the union should back him? Right?

A. You said I said the hoard-

Mr. Panethiere: I object to that, Your Honor. His statement was that he felt it should go to the fifth step, not that he should be put back to work.

By Mr. Browne:

Q. Is that true!

A. I said take it to the fifth step.

Q. Of course, going to the fifth step, you thought Benny

was right or you wouldn't want to represent him?

A. I will tell you why I said take it to the fifth step, that's what a representative do, he puts it in the board's lap, whatever the board decides, you see, it's completely out of your hands then.

Q. I say you felt Benny was right?

A. Yes, if I didn't feel like that I never would have made [fol. 172] a motion, you know, on top of that.

Q. Of course not.

A. I can't just sit here and tell how people are, healthy or anything like that.

Mr. Browne: All right.

Redirect examination.

By Mr. Panethiere:

° Q. Now, you stated you didn't know about the state of his health, you just wanted to get the monkey off of your back?

Mr. Browne: Wait a minute. That is objected to, move the answer be stricken.

The Court: Overruled. Thou his reduning brood a real said

By Mr. Panethiere:

Q. You just wanted the arbitrator to take it and let him decide what to do with Benny!

Mr. Browne: Same objection, and odd bias I bias up

The Court: Overruled.

A. Give it to the board.

Mr. Browne: Wait just a minute. Same objection.

The Court: Overruled.

By Mr. Panethiere:

Q. Now, Leonard, do you feel, as the representative, that you did everything that you could to help Ben?

ing afficiency a section of the Q

Mr. Browne: Now, wait a minute. That is objected to as invading the province of the jury, calling for a conclusion.

[fol. 173] The Court: Sustained.

By Mr. Panethiere:

Q. Did you perform all the duties incumbent upon you as a union representative?

Mr. Browne: Same objection.
The Court: He may answer.

Mr. Browne: Argumentative.

The Court: Overruled.

A. I may answer it?

By Mr. Panethiere:

Q. Yes.

A. Met

Q. Yes.

A. I did all what I know what to do.

Q. All right. Now, do you recall having a conversation with Ben where the sum of three hundred dollars was mentioned?

A. I recall the three hundred dollars.

Q. Tell the jury about the three hundred dollars.

A. He told me if I win the case he would give me three hundred dollars. Is that what you mean, like that?

Q. Yes. Is that what Ben told you? I was a work a street of

A. I told him, I said, "No, man," I said, "this is my job, I don't take no money." And I have never, and he shouldn't have mentioned that to me.

Q: Where was he when he told you that, Leonard?

A. Out in the street, out there, out in the street.

Q. By the plant?

A. Un-huh.

Q. Do you recall about when that was?

[fol. 174] A. No, I sure can't. It was hot. I know that.

Q. Did he ever tell—state—you were his friend, weren't you?

A. I was his friend.

Q. Did he ever say anything to you about Mr. Vaca demanding three hundred dollars from him?

A. I never heard that. I never heard that.

· Q. You were present when Dr. Day made some comments about Mr. Owens's condition?

A. Yes, sir.

Q. Was Mr. Owens present when Dr. Day was talking to you?

A. He was there. He was there.

Q. He was there?

A. When he told me that, I got scared myself.

Q. When he told you what?

A. That the man wasn't able to work, he actually told me that, and Ben Owens was actually standing right there, he said, "Man," he said, "I would help him to get some kind of—"

Q. Did you have any discussion with Dr. Day or did he have any discussion about predicting life and death?

A. Yes, he did, I know he said that his apparatus, he said, "My apparatus is not even high enough for Ben." That's what he said.

Q. When he was taking his blood pressure?

A. I guess so.

[fol. 175] Q. What comments did he make about predicting life and death?

A. He went on to tell a story about a fellow that he turned loose out of his office one time in the same condition with hypertension cardiac, he was a mechanic and he was working under this car and when he would bend down to work on some type of thing on the car, the man dropped dead.

Q. Did he say that that was possible, could happen to Ben if he went back to work?

A. He absolutely did, he just wasn't for it, he just wasn't for the man going back to work.

Q. Now, did Ben explain to you how he happened to pick

Dr. Day!

- A. Yes, he told me that Dr. Day didn't like the company and he got this doctor, that was his words, I didn't ask him for that.
- Q. Did you or to your knowledge did the union have anything to do with selecting Dr. Day?

A. Hun-uh nobody, he selected Dr. Day.

Q. Who paid Dr. Day's bill?

A. The union paid that bill.

Q. Wasn't there arrangements made, Ben had become dissatisfied and they decided to let him pick his own doctor and they would pay the bill?

A. Sure.

Q. You remember that, don't you?

A. Sure, I recall that, I do recall that.

[fol. 176] Mr. Panethiere: I believe that's all.

Recross examination.

By Mr. Browne:

Q. I wanted to ask you about this prediction by Dr. Day that you say occurred that if Benny Owens did hard work he'd die.

ender stammer einer obei eine

vomonth date h

A. He didn't say about no hard work. He said if the man went back to work.

Q. What?

A. He said if the man went back to work.

Q. Meaning any work?

A. I guess he was just speaking about down there on the job, I guess.

Q. And that was four years ago!

A. I guess it was four years ago, sometime.

Q. And so if Benny Owens has done any hard work since then, can we agree that doctor was pretty wrong?

Mr. Panethiere: Your Honor, I object. That calls for a conclusion on the part of this witness.

The Court: Sustained.

Mr. Panethiere: He doesn't know what type work this man has been doing or how long he was working, if he had been working.

The Court: I sustained the objection.

Mr. Panethiere: Thank you. Mr. Browne: That will be all.

(Witness excused.)

serve anade (Ben had become [fol. 177] AFTERNOON SESSION

emember that Mon't you

CALEB MOONEY was duly sworn.

Direct examination. Has no of I dead Hop

By Mr. Panethiere:

A. Caleb Mooney, 2716 Grove.

Q. That is Kansas City, Missouri!

Q. Are you employed at Swift and Company!

A. I am.

Q. And you are a named defendant in this lawsuit, are you not? STREET, SIN

A. I am.

Rots on the grievence!

- Q. Have you been an officer of the local 12 Packinghouse Workers!
- A. I have wind to herocard zones once english Di
 - Q. What office did you hold?
 - A. Vice president. dis sun savas susses shair a and L. A.
 - Q. Are you an officer at this time?
 - A. Yes, I am out sort qualities of the made provided.
 - Q. What is your office now?
 - A. Vice president. A state of and taxif all .
 - Q. Do you remember the grievance of Benjamin Owens!
 - A. Yes, I do your brist and more thon the indicative O
 - Q. At that time you were vice president?
 - A. Yes.
- Q. Mr. Mooney, under your collective bargaining agreement do you have a grievance procedure!
 - A. Yes, we do.
 - Q. And that is a five step procedure!
 - A: Yes.
- Q. Would you explain briefly to the jury and the Court what those five steps are, how they are handled?

Was draw the case slope with all

A. Five step grievance procedure, the first step is handled orally with the management, with the foreman; the [fol. 178] second step is in writing and it is held between the two union officers that's listed on the bottom of the grievance sheet and the supervisor or the foreman of that department; the third step is with the general superintendent's office with any three people the union so choose and usually the president comes; and the fourth step your case has to be voted on by the executive board to go to the fourth step, if the board deems that the case has merit that warrants the fourth step they take a vote and the majority can send the case to the fourth step; then if they are not satisfied in the fourth step it is taken back to the board and it is voted on again for the fifth step.

- Q. The fifth step is arbitration!
- A. Arbitration artificiones so frotting as doi a mid svig
- Q. What is the purpose or why do you have five steps,

A. The five steps is to try to bring out all the facts in

Q. And are some cases disposed of between the first and the fifth?

A. That's right, some cases are disposed of in the first s your and only of this tage!

Q. Now, when is the first time that the executive board acts on the grievance? in a five a pella cumor al

A. The first time the executive board acts on the griev-

ance is the fourth step.

Q. Whether it goes from the third step to the fourth step ?

A. That's right.

Q. When is the first time that you as an officer of the [fol. 179] local became aware that Benny Owens had filed

a grievance?

A. Well, I wouldn't be too specific on the dates because I was handling the case along with Mr. Jamerson, what ever date he stated there, I didn't pay too much attention to the date because they were calling me whenever they were ready to handle the case.

Q. Would that be at the second step that you first entered the picture to bus guiliry what gate buodes [87] .fot

A. That would be at the second step. all nother own sall

Q. You have heard the reading of Defendants' Exhibit No. 17 which is the minutes of the second step meeting. mident's office with any three people the uniquesed I care

Q. And what happened at that second step meeting?

A. In the second step meeting that was held the company presented a document to the union and stated that their position would remain the same.

ordy can send the case to facilized that saw tad Virol

A. That he was not able to return to work for the lack of sufficient medical evidence. We in turn asked the company if they couldn't find a lighter job for Mr. Owens and give him a job as janitor, or something of that nature. The company had a sheet, which we do not have, and on this sheet that they had received from some doctor, I don't know what doctor, they said he wasn't able to work in extreme climates, neither too hot or too cold, he couldn't climb stairs, and it stated a list of things on there that [fol. 180] Mr. Owens wasn't able to do.

Q. All right. What was the union's position as to whether or not Mr. Owens should have a job?

A. We told him that we would step the case up to the third step. atal tasm an ma deachtva tubilista significant

Q. And was that in fact done? The maintailed and a role

A. It was, her addition of the sy their share and the bins

Q. And were you present at the third step meeting!

A. I was no at left dor retroit a ball of the banger pobs

Q. And what happened at the third step?

A. We went over the same documents and the company told us if we had no new evidence to produce that their position would still be the same. I all moitatil dans aids

Q. And did the union have any new medical evidence at that time? what knew weeks later for but a betatilided

A. We didn't at that time. another labeled

Q. You are familiar with the exhibits that have been introduced here, the statements of the various doctors stating that Benny Owens was physically able to perform regular work, able to resume work, and so forth!

A. Only one here I am familiar with, this one from Dr.

Alexander/

Q. Dr. Alexander. All right. Now, what position did

the company take on these medical reports?

A. The company taken the position that on these medical reports that these wasn't a complete medical report, that they wanted a statement, they have some forms that [fol. 181] has to be filled out, and they wanted those forms filled out, what was wrong with Mr. Owens, and what medication he had, and when he would be released for any executive board -you were a member of the executive

Q. All right. Now, you were also present at the fourth step, were you not, Mr. Mooney?

Q. Were you present at any meeting at neaw I sey wArs

Q. And what happened at that fourth step meeting?

A. In the fourth step meeting Mr. Owens was present, and Mr. Burns from Chicago, Mr. Kobett and Mr. Vaca and Mr. Jamerson and myself and there were some others present. We went over Mr. Owens's case again and we still didn't have the sufficient medical evidence that our book states that you have to have sufficient medical evidence and the company hadn't taken any of this to be acceptable medical evidence so we went into the discussion of rehabilitation. The company stated to the union and Mr. Owens that they would be glad to take Mr. Owens and have him rehabilitated and help him get his social security and try to find a lighter job that he could do that would give him a longer life span because all we had to go on was what each one of these doctors put in on the statement. So in turn after we talked this over and about this rehabilitation, the heart association. I was under the impression that Mr. Owens agreed that he would be rehabilitated. And not until some weeks later I found out from the industrial relations man down at Swift's that he had offered to take Mr. Owens up and help him but Mr. Owens refused to goldente astate out and phenportui

[fol. 182] O. Who was the industrial relations man! STEA. Mr. Barry to ban show outreer of alda .

Mr. Browne: Wait just a minute, now, that last is voluntary statement, not responsive, based on hearsay; move it be stricken and the jury instructed to disregard what Mr. Owens said whoever it was Mr. who! Whoever he said

The Court: Sustained as to what was said, hearsay.

find By Mr. Panethiere band and ball and of and [181 lol]

Q. After the fourth step meeting, were you present at any executive board—you were a member of the executive Continuent pour post also also and to the continuent

AbiYee, I was a jariter I versolk mike bed upy was a cost

Q. Were you present at any meeting at which Mr. Owens was present after the fourth step ! benegged, and as budy.

A. Yes, after the fourth step when it was learned that Mr. Owens didn't want to be rehabilitated then it came back to the board, well, what would we do next, so then they said, "We will take-" we agreed that we would send Mr. Owens to any doctor of his choosing to see if we could get some better medical evidence so that we could go to arbi-

Q. And what was the outcome of that decision, Mr.

Moonevf

A. Well, the outcome was that he and Mr. Jamerson went to Dr. Day and in turn brought back this report from Dr. Day, stating that he would be willing to help Mr. Owens to not inquire countries or the not

[fol. 183] Mr. Browne: Your Honor, what the report stated-Q. Is that all in the reductes

A. Ves. if is in the minutes.

The Court: Sustained.

By Mr. Panethiere:

Q. Who selected Dr. Day to examine Mr. Owens

A. Mr. Owens, I imagine.

Q. Did the union have anything to do with picking the doctor! for your Memoritagide adle darries live I bestoning

A. No.

best evidence, technically, Overruled Q. Did the union pay the bill for the report?

A. Yes, they did.

Q. Was there a subsequent executive board meeting at which a report from Dr. Day was received and read to the boardf widence to co and farther with the eneck !

A. Yes, it was

Q. I hand you what has been marked as Defendants' Exhibit 18 and ask you if that was the letter that was opened at an executive board meeting! entt ko mineralizad

A. Yes, this is the same.

Q. Now, after that letter was read to the executive board and examined, was there some discussion as to Ben Owens's case to maket stovic each caw most line profit with A. There was no vote taken for arbitration saw ered. A.

Q. Were any motions made of the fifth step?

A. Yes, there was. Yes, there were some motions made.

Q. What was that the new allows being stated

A. The motion was made that

Q. Who made the motion to the state of the s

A. Well, that's been a pretty long time. I don't remember who made the motion.

Mr. Browne: Excuse me just a minute. Question, please, [fol. 184] as a basis for an objection.

By Mr. Browne:

Q. Is this action of the executive committee or whatever this is, board? THE PARTY OF THE P

Beatmack Strikers

i shi tot linusurvacionum an hieli a k

A. Yes.

- Q. Is that all in the minutes?
- A. Yes, it is in the minutes.
- Q. All the action they took?

A. Yes.

Mr. Browne: We object to that as not the best evidence,

The Court: That is technically correct. Do you have the minutes? I will overrule the objection. It may not be the best evidence, technically. Overruled.

By Mr. Panethiere:

Q. What was the motion made to the executive board?

A. We needed some more evidence, we needed, lack of evidence to go any farther with the case.

Q. Was there a motion made to go to the fifth step?

A. There was not.

Q. What was the decision of the executive board?

A. The decision of the executive board.—I have missed something.

Q My question was, there a motion made by someone to take this from the fourth step to the fifth step, to go to arbitration, and then was there a vote taken on it?

A. There was no vote taken for arbitration:

Mr. Browne: Objection to all of this, Your Honor. [fol. 185] The Court: The objection is overruled. . Temit

Mr. Panethiere: I don't think he understands my question. re Defendants Exhibit No. 19 met lest for identification

By Mr. Panethiere:

and to Bertle Penethierenin Q. My question was not whether there was a vote taken to arbitration. Was there a motion made by someone on whether it should go to arbitration, then a vote taken on whether it should or should not?

A. The vote was held it should not because of the lack of

evidence.

Q. All right. Then was decision made whether it should go or not? Did the board decide to go to the fifth step? A. The case was left in the hold period.

By Mr. Panethiere:

Q. Did the board decide not to go to the fifth step!

Mr. Browne: That's objected to as leading and suggestive and repetition. He has already got an answer out of this gentleman. The Court. Overraied, it will be inselved.

Defendants Exhibit No. 19, so. beliave tracal affin

evidence, is not included herein, but will be filed somerately By Mr. Panethiere:

Q. What was the decision about the fifth step, whether or not they were going to arbitrate it t mabashad , work . O

A. We didn't have enough sufficient medical evidence.

Q. Well, what was their decision for sound blod [81.101]

A. Their decision was not to send the case, or has andire

Q. To arbitration!

A. That's right.

A. That's correct. A Thank you. All right. Then you stated that they based [fol. 186] that on some reason?

A. The lack of medical evidence, grantiane 1 all vel

Q. Now, did you have some conversation with Mr. Owens after he was advised of the decision of the executive board? A. No. Pdidn't.

Q. You haven't had any conversation with him since that

as I have not restored and think it was stone by and I was

(Defendants' Exhibit No. 19 marked for identification)

By Mr. Panethiere:

Q. Mr. Mooney, I hand you what has been marked for identification as Defendants' Exhibit 19 and will ask you to read that and if you can tell us what that is?

A. Yes.

Q. Just, what does that purport to be! Is that the minutes of the third step meeting!

A. Yes, third step case.

Q. Third step. All right. And does that correctly reflect what happened in the third step?

A. It does.

Mr. Panethiere: At this time we offer in evidence Defendants' Exhibit No. 19, Your Honor.

Mr. Browne: Well, we object to it, not signed by anybody, self-serving, just a photostat of some typing.

The Court: Overruled. It will be received.

(Defendants' Exhibit No. 19, so offered and received in evidence, is not included herein, but will be filed separately)

ing was the decision

By Mr. Panethiere:

Q. Now, Defendants' Exhibit No. 19 reads as follows: (Exhibit 19 read by counsel) Now, Mr. Mooney, after you [fol. 187] hold these various steps, they are reduced to writing and you reserve a copy, is that correct?

A. That's correct.

(Defendants' Exhibit No. 20 marked for identification)

By Mr. Panethiere: " Solder to A pain of the

Q. Mr. Mooney, I hand you what has been marked for identification as Defendants' Exhibit No. 20, and ask you

if that is the memorandum you received following the pany agreed to reimburse one of the toniteem quit direct A. Yes pay the company had failed to pay him all all year

Mr. Panethiere: Your Honor, I offer in evidence Defendants' Exhibit No. 20: | reisele frue out II removed which

Mr. Browne: I take it you mean only the catey at the bottom, de you le The other concerns something else 19 voro

Mr. Panethiere: Yes, that's correct. Well, I want to of fer the entire exhibit into evidence and I consultant the

Mr. Browne: We object to most of it. It is an entirely different case as far as I can tell if no to be sogath bun agets

Mr. Panethiere: Your Honor the only pertinent part is the Owens case. We will tie in the other cases as to show

The Court: It will be received in evidence.

(Defendants' Exhibit No. 20, so offered and received in evidence, is not included herein, but will be filed separately)

By Mr. Panethiere:

Q. Now, Mr. Mooney, on this memorandum you received following this fourth step meeting, there are other cases listed there are there not! Him I rotaintens A. Ver

[fol. 188] Q. And in your experience as a union officer, are there cases disposed of in various manners and different steps?

Mr. Panethiere: What is dated Wavember 15, 1960. F. A.

Q. Does that document reflect how many such cases were disposed of 1

Q. In the normal course of business ! Q. Now, do you know, did you

No more than the courth step m Q. For example it shows there one particular case the union agreed to withdraw, did they not?

A. It does.

that have r been established Q. And that's the fourth step!

A. That's right has wen established in the evidence

Q. And there was another grievance there where the company agreed to reimburse one of the employes for some pay the company had failed to pay him?

A Yes ashive at talle I monothered to each Mr. Browne: If the Court please, if we are going to go into all the other cases the union handles, we will be here forever. I object to that as having no bearing at all on this case.

Mr. Panethiere: I want to show Your Honor that the pattern is that various grievances are handled at various

steps and disposed of on their merits. An and an sent interest the

The Court: It is collateral. I will sustain the objection to that. Sustained. The jury will disregard the last quesbestown tion and answer. the mutter was previously

harriest oil flow it there bax

de communication and the state of

endants Exhibit No. 20.

By Mr. Panethiere:

- Q. Now, at the bottom of the page, we have a grievance numbered 10-22105.
 - A. Yes.
 - Q. Is that the Ben Owens case!
 - A. That's the Ben Owens case.
- following this foneth suspen Mr. Panethiere: I will read that to the jury.

(Defendants' Exhibit No. 20 read to the jury by counsel)

Mr. Browne: What is the date of that, please, at the bottomf

Mr. Panethiere: That is dated November 16, 1960.

Or Finds thetedoctimed ordioc howevers sign research By Mr. Panethiere: ota steps, they are the beardail

Q. Now, do you know, did you personally have anything to do with trying to rehabilitate Mr. Owens (and oal)

Q. Mr. Medney, I bend y deal drivel att steel but Q dentification as Defendents Exhibit No. Main event

A. No more than the fourth step meeting.

Mr. Panethiere: You may inquire washitiw of beerge dollar

By Mr. Panethrere:

Cross examination.

By Mr. Browne: . . ! sansig viswana tuo Y .O

Q. Just a few questions, please, Mr. Mooney. You were vice president of the National union as well as of the Local union, right? · abstrage teopper a doug!

A. Yes.

Q. And actually did you know as such officer of both the national union and the local union that it was the duty of the officials of the union to represent the men in any grievance they had against the employer?

A. Yes.

Q. And that it was their duty faithfully to do that?

Q. You knew that, didn't you!

A. Yes.

Q In other words, that they should not work for the company or against the man, they should work for the man, the reverse, is that right, and against the company; they [fol. 190] should work for the member!

A. I don't think I understand that.

Q. Well, did you consider the officers, officials of the unions duty to their own members was to work for the man in his grievance against the company?

A. I feel that they should.

Q. Yes. All right Now, actually did you consider as such an officer that it was necessary to pay anybody three hundred dollars or any other sum by a member to some official of the union to carry on in to the fifth step! and aids that

A. Do I feel that that should be done?

Q Yes.

burshed the case because A. I don't feel that it should, no.

Q. You feel additionally that that was improper, don't A. We might for have verer thought it had any merit for

Mr. Panethiere: Your Honor, I am going to object to Your Honor, and help requirement that hasn't been established.

reports or doctor's statements.

Mr. Browns. It has been established in the evidence. The Court: Overruled, que embed data and the beat

By Mr. Browne:

Q. Your answer, please?

A. State your question again.

Q. Do you think that's improper to make a request like that of one of the members for three hundred dollars!

A. If such a request was made.

Q. That's what I say, if it was made it would be improper, [fol 191] is that right? - wall now in

ick byeads sow it that union from out his holian busiten

Q. There is nothing in the rules of the union that provides for anything like that at all, is there, your union?

A. No.

Q. All right. Now, actually all five, all of the steps are decided by the company official, one official or another of the company, except the fifth step!

A. Yes.

O. Isn't that true the day and said about senten lathed best and of tentegenowi

A. Yes.

O. All that the union can do in the first four steps is present its grievance, its member's grievance to the company officials? Wanter Chart

A. Yes

Q. And then the company official decides it, and after that the only thing the union can do is go on with the case?

Average of trainer compared to all

of A. If it has merit, yes. Is about Row it had

Q. Yes. Well, you thought, the union officials thought that this case had merit up to the fourth step, didn't you, because you pursued it! Right socia tail tail.

A. We pursued the case because we were trying to help

Mr. Ben Owens.

Q. Well, I say, didn't you think that the case had merit?

A. We might not have never thought it had any merit. 1100

Q. Well, you thought it had as much merit in the third step as you did in the fourth step, didn't you! Nothing new [fol. 192] developed between those steps, did it?

A. Well, the same, during the time between all those steps we figured that we might come up with some new doctor's

reports or doctor's statements.

mulitadi tadi

Q. I wonder if you would be kind enough to answer my question, sir. you saw that, didn't you?

A. State your question again A 10 vd one add nose I .A. Q. Between the third step and the fourth step, nothing new developed, did it?

A No. o which a so now built was now of a high tracks Q. Because only about, let me see, from August 31, 1960 to November 16, 1960, only about a month and a half intervened, didn't it! a blanchall ground and was dubib wor .Q.

A. That's right on sin sinusor of beaution anim came only Q. All right. And so actually nothing new developed between the second step and the third step either, did it!

A. No.

A Hang for ever seen that to chieronautt. Q. All right. So what the union knew then let's put it this way—the union knew just as much about this case at the second step as it did at the third step and the fourth step. We can agree on that, can't well to good the last argond, here some place. Well, maybe this is all .ON .A.

Q. Well, what do you say came up different? . . sos out to l

- A. In the third step it was more medical evidence submitted.
- Q. Well, in the fourth step there was more submitted for Mr. Benny Owens, wasn't there?

A. Yes.

of all fair early at discovering Q. Yes. And this that Mr. Owens submitted to you or to [fol. 193] the union officials, I should say, in the fourth step, included at least these statements or copies of them, photostatic copies, you remember seeing those, of course, don't yout decide to old it inere, didn't they

A. I seen one, as I stated.

A. Timt's right. Q. Well, didn't you see these others! Didn't Mr. Kobett show you these others lident bins leanuon and as linu deta

A. I did not see the others. I seen the one I stated I seen.

Q. Dr. Alexander!

A. That's right.

A. That's true, Q. Saying the man was physically able to perform regular work, right?

edf. to return to pagular stock, thut you try to get him!

my question. Did you began use Dr.

A. In his opinion. prince six Denate have who supplies with his distant the man was

Q. Yes, and also the one by Dr. Alexander May 19, 1960, you saw that, didn't you?

A. I seen the one by Br. Alexander.

Q. The one July 8, 19601

A. That's correct.

Q. All right. Do you say that you as a union official did not see Dr. Hesser's statement as to the blood pressure!

An I did not as dinout a month and to zennesco. o

Q. You didn't see Dr. Bruce McDonald's statement that the man was released to resume his regular work as of May 15, 19601 was emission villantes os fur & . 1

tween the second step and the third was enthusion bid A

Q. Have you ever seen that to this moment?

So what the majon knew their stadT At

Q. What's right! You have or have not!

A. I haven't seen it until today. B byo II an gold brook

[fol. 194] Q. Now, how long we had a couple more around here some place. Well, maybe this is all we had. Let me see, McDenald, Hesser, Alexander and Gill, yes, have you ever seen this statement from Dr. Gill about the blood pressure!

A. I stated on three occasions I had only seen one.

Q. All right. Now, regardless of what you had seen or hadn't seen, is it true that the union officials decided to hold this matter in the fourth step, just to hold it, and made that decision on November 16, 1960, is that right?

A. Yes, because he was being rehabilitated.

Q. Well, regardless of what the because was, they did decide to hold it there, didn't they? en one, as I s

A. That's right.

Q. And they continued to hold that thing in the fourth step until as your counsel said in his opening statement. May the 8th of 1964, about a month or a little more ago. isn't that true! A. That's true.

A. In his opinion, Supersonal intervent bareloven (2012101) A: Well, the come, curring the time be beach all those ctaps ; we firered that we might poke up with some new dector's

O. Saving the man was physically able to perform regular work right?

reports or doctor assistantals.

[fol. 197] Redirect examination.

Q. Did you try to get Dr. Alexander whe says the same By Mr. Panethiered top of value of bib soint anidi

[fol. 198] Q. Now, do you know what actually was taken on May 8, 1964 on Ben Owens's grievance, May 8th of this vear! A. I did note see seed

Q. Of this year!

A. Do I know what taken place? Yes, I do, yes.

Q. All right and Modling without the their block of A. We met at the President Hotel again and we asked the company to reconsider the Ben Owens case, we would like to discuss it. A. Not in the lought alep, not eat.

Q. And is that the time it was decided to withdraw the [fol. 199] grievance! May 8th of this year! an array average

A. There or profit ...

A. Yes.

O. And actually you have never told him until this min [fol. 200] Q. What is the procedure when the company takes the position the man is physically unable to work?

A. The procedure is the same procedure that's been followed with Mr. Ben Owens. We keep sending them to doctors, maybe the final doctor will give him a clear bill of goods and we can handle his case.

Q. And were you ever able to successfully get such a doc-

tori

A. We were not blot exist the might be told told your same. A. Vdon't know what he might base told

Mr. Panethiere: Thank you.

fol. 2023 Page Spares Co. Solland Recross examination.

fore examination By Mr. Browne:

Q. Did you try to get Dr. Bruce McDonald?

A. We tried we sent him to the doctor of his own choosing. our chandan

Reduced exemination.

Q. Please answer my question. Did you try to get Dr. Bruce McDonald here who says in exhibit 3 that the man was able to return to regular work, did you try to get him?

A. I didn't try to get him minday download the say [50] that

Q. Did you try to get Dr. Alexander who says the same thing twice, did you try to get him

A. I did not.

Q. Did you try to get Dr. John Gill who makes the state-[fol. 201] ment about his blood pressure being 160 over a hundred?

A. I did not.

Q. Of did you try to get Dr. Hesser who makes the same

low, know what theen place! Yes, I de, yton bib I A

Q. And you held this hearing without Mr. Owens being present the other month, month before this one, didn't you?

Mr. Owens wasn't there at all, was he?

A. Not in the fourth step, no.

Q. Why, he wasn't there, and he didn't have any representative there unless it was you, did he?

A. That's right.

Q. And actually you have never told him until this minute that you, as you say, withdrew his grievance from the company, have you?

A. That I couldn't answer.

[fol. 202] Q. Yes. Mr. Owens never told you to withdraw it, did he!

lowed with Mr. Sen Owens

Mr. Panethiese: Thank

A. He didn't tell me to withdraw it, no.

Q. Or anybody that you know of, did he?

A. I don't know what he might have told anyone else.

[fol. 203] The Court: Go ahead, sir.

Redirect examination.

By Mr. Panethiere; at the togot entroy bill .9

Q. On these various steps does the grievants have to be present, Mr. Mooney?

Mr. Browne: That's objected to as invading the province of the jury, whether they were acting in good faith.

Mn Panethiere: Your Honor, we are talking about rules [fol: 205] inaction of the union! point out anotheringer bas The Court: Overruled. A. Well, I didn't know-O. Is that true? By Mr. Panethiere: do your off said wonder which book Q. Do the grievants always have to be present? A. The first step the grievant can either take his grievance to the supervisor with or without the representative; from then on the aggrieved is not in it unless you want him. [fol. 204] Q. All right. And the union represents the man, don't they! Q. You thought it was good thith to thing start of Q. And do all cases go to arbitration? draw his claim without even not symmetime and soid warb Q. A lot of them are settled at different steps, aren't thevi A. That's right. Mr Browne: Tlat's all. Q. And a lot of them are withdrawn at different steps ! A. That's right. Q. You don't have to ask the man, the aggrieved whether or not he agrees to withdraw it? A. Don't have to, no. MANUEL VACA was duly sworn. Q. What are your duties as a union representative? A. Our duty is to do all we can for an employe. Q. Did you do that for Benny Owens? Mr. Browne: Wait just a minute, please. That's objected to as an attempt to ask this witness to rehabilitate himself. This is the jury's function. The Court: Sustained. 1608 7 all and include of W. Q.

Kangas City, Missosizi?

[16] 2061 Q. Where are you employed I have the By Mr. Browne:

Q. You said that you don't have to have the man there at these steps but is it your opinion as a union official that good faith by the union and common fairness would insist that you do have him present, especially when as in this case you Q. Did you ever see the form?

Swift and Company.

. Mr. Panethiere: I believe I have nothing further.

knew he was objecting to the actions of the union, the . [fol. 205] inaction of the union to the unio

A. Well, I didn't know beligger Or : frue I en'?

Q. Is that true?

A. I didn't know that he was objecting to the action.

Q. Why, you knew a suit was filed against the officials for the union, didn't you?

A. That was filed when it first started out.

Q. Sure, and you knew it was near time for trial when [fol. 204] Q. All right, And the union repr. Ibenequal sidt

A. I didn't know how near it was to trial.

Q. You thought it was good faith to the man you were supposed to represent, didn't you, to go ahead and withdraw his claim without even notifying him about it or telling him about it afterward, is that right, sir!

That's right."

or not be agrees to withdraw at

Mr. Brawner Wain and we

A. I don't know. I didn't withdraw his claim.

Mr. Browne: That's all. Mr. Panethiere: That's all. it wers medt to tol a bad. O

(Witness excused)

O. What are your duries as a union representative?

Direct examination fixes on the object of viole woo. A Q. Did von do that for Benry Owens?

By Mr. Panethiere:

Q. State your name, please, we state the or thurst had an or

A. Manuel Vaca.

Q. Where do you live, Mr. Vaca! begins and grown adT

A. 7303 Holmes, nichten aved Laveilled L. and dienis 4 . M.

Q. Kansas City, Missouri?

A. Kansas City, Missouri. Recross samulation.

[fol. 206] Q. Where are you employed?

A. Swift and Company. : enworld all the

Q. How long have you worked there?

A. Going on twenty-six years.

Q. Were you, during the time of the Benny Owens grievance, an officer of the union!

whether they were acting in good farth.

Q: What was your position? At 184 withind an HoToQ A. President of the union. was on Ben Owens. Q. President of Local donn witnessed and and Plates. Q. And they had modified evidence that sail bad yads but. Q Q. You were familiar with that grievance, were you not! A. Yes. Q. And at what step did you enter the grievance procefourth step moethn von, as union president, was it iterate A. Third step. eds thin heart westing an pay bit so wrea Q. And is that the normal procedure for the president to enter it at that step? A. Yes. Q. And were those facts reduced to writing! Q. You were aware of the company's contentions in the Owens case! endants' Exhibit No. 21 marked for i A. Yes. Q. What was the company's position as to Ben Owens! A. Well, the union did not have an acceptable medical report to the company's satisfaction make no Q Now, have you seen, you weren't present here yesterday, have you seen Plaintiff's exhibits 1 and 3? A. Yes. Q. And are those the medicals that you state the company didn't consider sufficient? enth'sten theching A. Acceptable; yes. Q. Acceptable. And did the company have some medical [fol. 207] reports A. Yes. Exhibit No. 21 ax Q. And were they one page reports, as we have here, or how did they compare with these reports heserg add, at broom A. Well, of course, there were some of these there but also they have a form that they have for a doctor to fill out and I think I don't see it here but they had a form that I believe Mr. Owens states that was from Dr. Morris from the University of Kansas Hospital. In that form they have negociandum-prepared. Yenot Mr. Browne: Just a minute. What is in that form we object to as not the best evidence here.

a Colleger og side the record).

Q. Did you ever see the form?

By Mr. Panethiere:

A. 16

Q. Tell us briefly what the company's medical position was on Ben Owens of the hands and no medical position.

A. That he was physically unable to perform his work.

Q. And they had medical evidence that satisfied you to

A. Yes, ros speet a sait was filed arrains

Q. All right. At the fourth step meeting, or prior to the fourth step meeting you, as union president, was it necessary, or did you in practice meet with the company to try to get all the facts in the case?

A. Yes at linew how near it was to or highly had in the wine

Q. And were those facts reduced to writing!

AcaTetraine and a remain of the same and the Alexandra A

(Defendants' Exhibit No. 21 marked for identification)

[fol. 208] and By Mr. Panethiere:

Q. I hand you what has been marked for identification as Defendants' Exhibit 21, and ask you if you can identify that?

A. Yes.

Q. Is that a memorandum that was prepared for the fourth step meeting!

A. Yes.

Mr. Panethiere: I offer in evidence, Your Honor, Defendants' Exhibit No. 21.

(Whereupon, the following proceedings were entered of record in the presence but out of the hearing of the jury:)

Mr. Browne: Paragraphs 6 and 7 on the first page of this exhibit are objected to as hearsay, not the best evidence, no showing as to the verity of the conclusions or the facts upon which they are based.

Mr. Panethiere: It is a memorandum prepared, Your Honor, in the usual course of business. He is the president of the local and t

(Colloquy outside the record)

Q. Did you ever see the form!

By Mr. Panethiere:

object to as not the best evidence here:

COTE

The Court: Well it will be received in evidence of cluded timit Benewastin as uppition to do regular dant

Mr. Panethiere: Part of a business record, Your Honor, The Courts Objection sustained as to paragraph Legali Mr. Browne; I still object, a business record wouldn't work, e Solution My Burns, company officialization ad

(Colloquy outside the record)

him the that fundamentati of different [fol 209] The Court: I am sustaining objection as to shev lindshen rehabilitated through the heard darrange Mr. Panethiere: Yes e bard oals bas adoj banol bas

(Defendants' Exhibit No. 21, so offered and received in evidence, is not included herein but will be filed separately)

(Whereupon, the following proceedings were entered of record in the presence and hearing of the jury:

Mr. Panethiere: I will read to the jury what has been admitted in evidence as Defendants' Exhibit No. 21, and this is a memorandum prepared for the fourth step, and is headed "Fourth Step Case 10-22-105 K C 9960" in the

(Defendants Exhibit No. 21 read to the jury by counsel)

The the meantain before we left Mr. Parent said by would talk to local official Mr. Helm who is industrial crations Q. Now it was on the basis of this memorandum that your discussions were held in the fourth step, is that corthat taken place at this particular meeting at the follows

A. Yes.

[fol. 211] step. Q What conclusions were reached as a result of the fourth step meeting, Mr. Voca to Bebie would nived a med

A. You mean with the national officers?

A. Yes. After a period of I magine about a west. A. Melly you know the first step is usually held in a hotel ever at town and, of course, you meet with the national officers, and also with the national company at the fourth step meeting. In this meeting of course, the company brought out all their medical reports and of security, he was in good physical condition and he das

course, we brought out our facts; in the end they concluded that Ben was in no position to do regular work; [fol. 210] also the light work was mentioned and, of course, they still held their position that there was no light work in a packing house and that he couldn't perform his regular work. So then Mr. Burns, company official, talked directly in person to Mr. Owens for fifteen minutes, telling him the full fundamentals of different individuals that had went through the heart condition that he had and that they had been rehabilitated through the heart association and found jobs and also lived a happy normal life. Of course, he talked to Ben and, of course, Ben at that time was listening to them, and also they stated that they would try and get his social security, which they would get his social security for him and get him on a normal course. Of course; Ben was confused to a certain degree and, of course, we listened and he still talked and talked and talked. So then at that degree, we decided between our union officials to leave the case open, and we left it entirely up to Ben Owens, whatever he wanted to do. Ben Owens said he wanted some time to think about it, so we convened as of there.

In the meantime before we left Mr. Burns said he would, talk to local official Mr. Helm who is industrial relations manager and would set up the date and appointment for Mr. Owens to go, if he so chooses, and so that was the last that taken place at this particular meeting at the fourth [fol. 211] step.

Q. All right. Now, did you have any conversations with Ben after it was decided to hold this matter in the fourth step?

A. Yes. After a period of I imagine about a week or two Mr. Helm stopped me and said he had made an appointment with I Owens to the heart rehabilitation and he had faile show up, so I said I would talk to Mr. Owens and see what he wanted to do, and Mr. Owens said that he wasn't about to go to any heart association or any social security, he was in good physical condition and he was

able to perform a job. So I brought Mr. Owens's decision to the board and the board ruled that since that we have tried every way we possibly could to get Mr. Ben Owens back to work that we will let Mr. Ben Owens pick a doctor, his own doctor, and we will pay the bill. So in turn Ben Owens said that—of course, he was there—he said that well, we will send Jamerson with him because after all Jamerson would know the questions that he would get from the doctor and would be best to talk up and be able to get Ben Owens back to work, so unbeknownst to me Ben Owens picked his doctor and they went to his doctor.

Q. Did you have a meeting after that when you

A. Yes. So then in a few days we got a letter from his doctor and we had a regular board meeting and this letter [fol. 212] was read to the board members and the board members voted on what to do with Ben Owens' case after receiving and reading this letter. Well, Mr. Jamerson got up, so since he was Mr. Ben Owens' representative all the way through, made a motion to send it to arbitrator, in order to fulfill his job all the way through, and I am pretty sure we had a gentleman there, a board member by the name of Mr. Randolph seconded the motion, there was discussion on the motion, quite a lengthy discussion; in the end the board ruled—

Mr. Browne: Just a minute. I want to ask a question as a basis for objection.

Q. You keep minutes on all of this, don't you!

A. Yes.

Q. Written minutes!

A. Yes.

Mr. Browne: We object to any verbal testimony as not the best evidence.

The Court: Overruled, but I will sustain objection to conversations.

Mr. Panethiere: Yes, sir.

mism By Mr. Penethiere would look hop a maply and olds

Q Proceed some tout help's burned adding brised add of.

A. And the board ruled not to send Mr. Jamerson's case at this particular time but to hold it and see what would develop, and in the meantime, after we held his case, Mr. Owens came into the hall numerous of times, not once, not [fol. 213] twice, but three or four times, and I asked Bea Owens, I said, "Ben, how are you doing!" He said, "I am doing fine." "Are you really!" He said, "Yes." I said, "Well, I am happy." Then one day Ben Owens pulled money from out of every pocket that he had and filled that desk with money, he says, "See, I am doing all right, I don't need no help," he says, "I am going to get my job back, I am going to get all my back pay and everything," he said, "You people have treated me fine and I appreciate it." That was the last I seen of Ben Owens.

Q. You weren't present yesterday, Mr. Vaca. Do you recall any conversation with Mr. Owens relating to money other than the incident you have mentioned when he pulled

money out of his pocket?

A. No. sir.

Q. Did you ever make a request or demand upon him for any sum of money? in - bolar busid olf bus

A. No, Bir.

Q. Would you deny that you ever requested three hundred dollars from him to handle his case? Hollogie to a stand B as

A. I never heard of no such a thing until it come up in

that meeting, that was a complete mystery to me.

Q. Now, as local union officer did you have the power to decide whether or not the case was going to the fourth step or the fifth step? Q. Written mignifest manner i is being

A. No. sir.

aped ine and exict he find made an accordation for Mr. Panethiere: You may inquire. 100 WW sonward white

mied to show up, so I said I would talk to meash we test ad! The Court Overfuled, but I will sustain objection is wasn't about to notile any heart to so tastion, denoticationing security, he was in good physical part formidate attraction

the case to the hith steps off

A. Teef e outrescous

By Mr. Browne:

- Q. Mr. Vaca, just a few questions, please. May we agree that the first time that any disinterested party acts as arbitrator is at the fifth step?
 - A. Yes.
- Q. And may we also agree that all the other steps, the first four, at all of those steps the decision as to the grievance is made by the company officials? Is that true?
 - A. Yes.
- Q. So that the only steps in which you officials of the union represented Mr. Owens were at steps where the company had the say-so on the decision, is that true?
 - A. Well,—
 - Q. The first four! desanto as become flid box tobus
 - A. Yes and no. and hor ben dane of daed og of olde goind
- Q. Well, what is the "no" to that?
- A. Well, it means this, that the union negotiates among themselves and warrants whether or not a case should be sent on and if we decide to withdraw the case in the first, second, third or fourth step, the executive board so chooses.

Q. But to push this step for your own members, the decision, if you are pushing the step the decision up to the fifth is in the hands of the company, isn't it?

A. Well, the fifth step is the arbitration step.

- Q. I am not talking about the fifth. I say up to the fifth. [fol. 215] A. Yes.
- Q. The decision is in the hands entirely of the company, is that right?

A. Well, of course, it goes both ways.

- Q. Well, I say if the union decides to push it, the final decision is in the hands of the company. Can we agree on that?
- o'AioYes I abib day forfy was now as a second second
- Q. All right. Will you agree that it would be improper for an official of your union to ask for three hundred

dollars to take a case, or any sum, from a member, to take the case to the fifth step?

A. That's outrageous.

Q. You agree that it is, don't you!

A. Yes.

Q. And it is true, may I ask you, sir, if Mr. Jamerson was present at a board meeting concerning the fifth step, a decision as to whether you would go to the fifth step?

A. You mean he was present at the fourth step meeting?

Q. At a meeting where the board was deciding whether to go to the fifth step?

A. Yes, that's the fourth step meeting.

Q. Do you say that these medical reports were submitted at the—I am talking about Plaintiff's exhibits 1 and 3, the medical reports in which Doctors McDonald, Hesser, Alexander and Gill expressed an opinion about the plaintiff being able to go back to work, do you say that those were [fol. 216] submitted to the company by you officials at any time?

A. Yes, but they, as you recall it has been stated before that you can present anything to the company and if it is not acceptable, then you haven't got anything.

Q. If you would stick to the question I asked you, please,

sir, then we will move along?

A. Yes, I did, I answered your question.

Q. The answer is yes, then?

A. Yes.

Q. And you knew therefore at all times that we are talking about that these four doctors did indicate that Mr. Owens was able to go back to work and do regular work!

A. It states there that they said that.

Q. Yes.

A. Yes.

Q. And so then when you say that you didn't want to go any farther with it as an official of the union, you were undertaking to evaluate these four doctors as to their opinion as being worthless?

L'illie commune.

di AniNoli in aggirenti la blod di dice di fiscosi in biscosi moladi

an Q. Is that it flort be despised on the relation part asserts fore that's

A. No no that's not it.

Q. Then what-franction and water strained and fall fell

A. Would you read the clause in our contract that states that a person, a member has to have acceptable medical evidence, and this is not acceptable medical evidence.

Q. Don't you know that Dr. Bruce McDonald is a fine doctor, although a colored doctor, if you want to put it

that way?

[fol. 217] A: Well, I don't think you should put it that

. Q. I don't either.

A. Why did you then the said a land said no said

Q. Let me ask you, do you know that Dr. Bruce Mc-Donald is a fine doctor!

A. Yes small: to knoune and sandatom to michous esex Q. Out here on 26th and Prospect!

A. Yes. Suevich and the the led well nov 9 Q. Do you know that Dr. Alexander is an old time doctor, been practicing for many years!

A: No question about that.

Q. An M.D., no chiropractor, and so forth. Do you know that Dr. Gill is an established doctor, has been for years; you know that, don't you! at sove he had provided modified

A. Let me say—

Q. Please answer.

A. Yes, Yes, and asky so valed lot bib at year and Q. All right. And the other doctor, Dr. Hesser, you know he is a reputable doctor. Right?

A. Right.

Q. All right. Now, Mr. Vaca, I will ask you if it is true that notwithstanding that you had these medical statements in your file, or copies of them, that about a month and two weeks ago your board met again; were you in that meeting?

A. No. I am out of office now.

O. All right. Well, let me ask you this then. Do you feel as a former union president that in the fourth step the union should in good faith hold a meeting in the fourth step, not advise its member who is interested, that a meeting is going to be held, or where, and then withdraw the [fol. 218] grievance from the company?

Mr. Panethiere: Your Honor, I object to this as irrelevant and immaterial, it is a matter that has happened since this lawsuit was filed, has no bearing on the grievance procedure, Your Honor.

Mr. Brewne: Well, he has pleaded it.

The Court: Overruled.

By Mr. Browne:

Q. Do you think that's treating the members in good faith?

A. Well, of course, the way that you are putting it, you are speaking of members, let's speak of Ben Owens. I think that the union acted in good faith, yes.

Q. You think that's all right then, do you?

A. No, I think that pertaining to the whole facts in this case I think the union acted in good faith.

Q. To arbitrate—I mean—

A. Yes. of the distallan

Q. Now, let me finish. Just to withdraw his grievance without notifying him or even telling him after they had done it?

. A. Ben Owens did not notify us when he was suing the company, he did not notify us when he was suing us.

Q. You had a summons served on you—

A. But Ben Owens was acting in good faith toward us, he had been to us many tmes, everything was going along fine, he told me.

Q. So then it is your feeling that the union was entitled [fol. 219] to take this action in May in retaliation?

A. Under this particular case, yes.

Q. In retaliation?

A. Yes, in this particular—not in retaliation, in good faith and good judgment; not in retaliation, no.

Q. Is a man in your employment there at Swift and Company, is he entitled to a pension under your contract agreement after twenty years service?

A. Under the provisions of the contract agreement, yes.

9 M. Jishangon

Mr. Browne: That's all.

Redirect examination.

By Mr. Panethiere:

Q. Now, you state that in your grievance procedure that the company, in response to his questions, controls the grievance procedure, is that right?

A. No. sir.

Q. Now, are some cases settled in the various steps?

A. Yes, sir.

Q. And on what basis—are they always settled on the company's terms?

A. No. sir.

[fol. 220] Q. Isn't it a fact that sometimes before you get to the, even the fifth step, that you work out a satisfactory solution to a problem with the company?

A. Yes, sir.

Mr. Browne: If the Court please, we object to going into all kinds of other cases in this trial.

Mr. Panethiere: You opened it up.

The Court: Overruled.

By Mr. Panethiere:

Q. Is it a fact that you received a copy of what has been marked as Defendants' Exhibit No. 20 after the fourth step meeting, did you not?

Q. All right. Doesn't that show under case No. 10-22-87

there where the company agreed to the union's terms and reimbursed a man for some pay that they neglected to pay him? of the cotton and the rest of the parties A. Yes derrie destinos mit los settive in aft t

Mr. Browne: That's objected to. The exhibit would be the best evidence.

The Court: Overruled. He has answered.

By Mr. Panethiere:

Q. Now, Mr. Vaca, in your term of office as president you became aware and cognizant with the sick leave provisions, did you not?

A. Yes.

Q. And to qualify for sick leave, what has to be the criteria of the employe!

[fol. 221] Mr. Browne: That's objected to since the contract would show that. It is in evidence. We say it is taking up time unnecessarily.

The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. When a person is off sick and as a general rule if he is not habitual, there is nothing ever said or questioned but if a person has been off quite a few number of times sick then the company requires him to bring an acceptable medical report.

Q. And during the period that he is on the sick leave

status does he receive any pay!

A. Yes, that you received a copy of what salt A.

Q. Do you know what percentage Mr. Owens was drawing while he was off on sick leave!

A. I imagine since he was off for quite—

Mr. Browne: We object to that, what he imagines at . A.

What who who the too W By Mr. Panethiere:

Q. Do you know!

A. Yes, I know he had to draw the maximum which is

[fol. 222] sixty-five percent.

Q. Now, in order to draw that maximum what proof do you have to give the company as to why you are entitled to sick leave pay?

A. Well, if you are off for a long period of time then you have to bring periodically accepted medical reports.

Q. Stating that you are unable to return to work!

A. Ves

Mr. Panethiere: Nothing further.

Recross examination.

By Mr. Browne:

Q. Sixty-five percent is for the fifth and subsequent weeks of disability, is that right?

seem 42 that they wanted this east to be beard in the ..

A. Yes, that's the last, that's the highest.

Mr. Browne: That's all. supposed with user the months of

(Witness excused.) I with tours out count theb I A

ERNEST F. KOBETT was duly sworn.

Direct examination. ar tipole alturat othrologous boddi ad

By Mr. Panethiere:

.O. Then you enter the Q. Will you state your name, please?

A. Ernest F. Kobett. The transparent and the rest of t

Q. Your address?

A. 1020 Court Street, St. Joseph, Missouri.

Q. Are you an officer of the National Brotherhood of Packing House Workers!

A. I amnigami ad tarte dash of hope of the or

Q. What office do you hold?

A. Office of first vice-president. prointens land vel

[fel. 223] Q. And that you consider at the national level as opposed to what we call local level?

A. Yes, sir.

Q. Do you service the Kansas City local, which is Local the company as to why you are

A. I do.

Q. You are a party defendant or a named defendant in this lawsuit brought by the plaintiff, are you not?

A. Iam.

Q. What are your duties as vice president of the national brotherhood?

A. The duties of first vice president of National Brotherhood is to handle the fourth step grievance cases, arbitration cases, and new rates.

Q. Do you also assist in contract negotiations?

A. Yes, sir.

Q. Now, have you had occasion to become familiar with the grievance of Benjamin Owens? all all ylideath to adenw

A. Yos, that's the last, that's the highest, at . bib I .A

Q. When did you first become aware that there was a grievance on behalf of Benjamin Owens!

A. I don't know the exact date, I received word from Local 12 that they wished this case to be heard in the fourth step.

Q. Ordinarily in a grievance procedure is that the first [fol. 224] notification that you receive when it goes from the third step to the fourth step?

A. Yes.

Q. Then you enter the picture at the fourth step level? A. At the fourth step level. 981.80

By Mr. Panethiere

Q. You make the arrangements for the fourth step meet-

A. I contact the company, requesting a meeting, tell them where we want to meet. Packing House. Workers le

Q. Prior to that time, what arrangements do you make to familiarize yourself with the facts pertaining to the A. I did not receive any coules of the company for bib I A.

A. Prior to that time I have contact with the local, they send me a copy of the fact sheets that have been submitted here in evidence, and I go over the facts of the case sent to me by the local and confer and talk to our attorney about it. It: The tained will and best A

Q. Now, ordinarily at these fourth step meetings do you usually have just one grievance, handle one grievance at a time, or are there many grievances processed at one time?

A. Well, it all depends on how many the local has. If we are at a given local, we handle all the grievances at the same meeting that they happen to have in the fourth step.

Q. Now, in your participation in the fourth step meeting will you tell us generally the discussions had and the results reached as a result of that meeting?

A. Are you referring to this meeting-

[fol. 225] Q. Benjamin Owens.

A. At the meeting of Benjamin Owens, at that time the national union, we were in a transition, the vice president whose place I took, Lawrence—was in charge of the meeting and the reason for that was, at the convention where I was elected the convention made a motion that he finish the unfinished business. In other words, he handled any cases that were on the docket up to that time. But I take the responsibility for the meeting that we had at the President Hotel. At this meeting we meet with the company, I have the representatives of the local as my assistants, we work together on the thing in getting all the facts, we present our facts to the company, and we argue the case, and in this case we wanted Ben Owens put back to work and we were unsuccessful, as you know.

Q. You say you were unsuccessful. Now, prior to that did you review all the records and the medical available

Honor, he has a duty to review the actions of the local

thing that was mishondhelf.

to you in this case?

A. During the meeting, yes.

Q Yes. And were you also furnished copies of the company's medical reports the edf intiw libernov extractions; of

A. I did not receive any copies of the company's medical reports, in that there express sond it must tell at asis? ...

Q. But you saw them there at the meeting?

Lete in evidence, and I go over the facts of the seek ve Q. Now, you have seen Plaintiff's exhibits 1 and 37 [fol. 226] A. Yes, I have seen these.

Q. And those were presented at that meeting, were they not, on behalf of Mr. Owens !

LAMEN Is bearing an analyzing rate great ear to paint a Q. And it was based on those that you were trying to present Mr. Owens's case fallent, and including the least of

A. These and some of the arguments that the local had

in regard to Mr. Owens. I of noise recommendation in the A. O.

Q. And what was the company's position with reference to these medical reports to tast. To place as formation

A. The company took the position that these medical reports were not conclusive, that they only showed the blood pressure, and that they required, they would require, in this case a full medical report, a til wis work moing fancing.

Q. Did they have any question as to the qualifications

of the doctors shown there! new tady not money and hear no

A. They did not question the integrity of these doctors.

Q. And prior to the time you entered the fourth step did you review the actions taken by the local office in handling the grievance of Benny Owens !

A. Yes, I reviewed that in the fact sheets.

Q. Did you find anything in reviewing those that would indicate that the matter had been mishandled for today of

Mr. Browne: Just a minute, now. That is objected to as letting this witness determine what the jury is to determine, calling for improper conclusion.

Mr. Panethiere: Your Honor.

[fol. 227] The Court: You asked him if he found anything that was mishandled?

Mr. Panethiere: In his capacity as national officer, Your Honor, he has a duty to review the actions of the local

officers in handling grievances. My question was whether he found whether or not this grievance had been handled properly.

Mr. Browne: Our objection is that that's what the jury is here to decide. and the base apport and the

f at blod ared had M. last ife

itmos super atrioda est duit

The Court: Overruled, an only med out. All sans majority

By Mr. Panethiere:

Q. Now, when you reviewed this record, in your judgmeht how was the grievance handled up to the fourth step!

A. The grievance, to my knowledge the grievance was handled correctly, and I get that idea from the fact that it did come to the fourth step, so they went through the steps.

Q. Now, did you talk with Mr. Owens here at the fourth step meeting?

A. I had some conversation with Mr. Owens, yes.

Q. Do you remember the discussion about, after no agreement could be reached, about trying to rehabilitate this mant

MALYERER SELECTION TOSTICE

Q. And what was your impression as to Mr. Owens's ac-

ceptance or rejection of those suggestions?

A. Mr. Owens seemed a little reluctant but it was my [fol. 228] feeling that when we we left the fourth step that he was in agreement with the way the union handled the grievance there at that meeting.

Q. And this matter was you were furnished a copy of what has been marked as Defendants' Exhibit 20, were

you not?

A. Yes.

Q. And that is where it states that the union agreed to hold that in the fourth step!

A. Right iff to a west add of insignof detaligned at am of Q. And that was in fact held in the fourth step until May 8th of this year, was it not? from the Control of 1

A. That's correct.

Q. And can you tell us what happened on May 8th of this found whether or not this grievances had been defined

A. On May 8th of this year we had-I had meetings scheduled in Kansas City to hear fourth step cases. At that time I requested that the company be prepared to review case 105, the Ben Owens case, at this meeting. I felt that it had been held in the fourth step long enough that we should make some determination. And on the review I got nothing new from the local over the report from Dr. Day which plainly stated that he was not able to return to work and that the union had acted in good faith. I therefore withdraw the grievance.

Q. And you were aware, were you not that there were lawsuits filed both against the employer and you were

O. Now, did you talk with Mr. Owens ! time ano di beman [fol. 229] A. Yes. The information on the company suit, it was hearsay. I received a summons on my own.

Q. Now, in handling grievances, about what percentage of cases go to arbitration! House bedager ad blood last.

A. A very small percent.

Q. In your work as vice president with the national do you have any notes to indicate how many grievances are filed during a given period! a sport to doise or 10 sound as filed during a given period!

A. Yes, I keep a record. of the bambas and of the ...

Q. Do you happen to have the record with you?

A I happen to have the record drug off there for a period of time on grievances that were handled and how they were settled—and settlements in different steps.

Q. What period of time do your notes reflect?

A. From 9-1-'61 to 8-16-'63.

Q. How many grievances were filed?

Mr. Browne: If the Court please, how many grievances were filed altogether or what was done with them, seems to me is completely foreign to the issues of this case. We object to it for that reason, had been an any last head.

Mr. Panelsieres In his espacity as audennoughed R. A. Henor, he has a dary to review the actions of the biggs

May Sik of this year, was it not?

The Court: Overruled.

hasso By Mr. Panethiere: no abyte a necessor a and H Q

Q. How many grievances were filed in that period?

A. In that period of time for all plants, 967.

Q. And were some of those settled in the first step! [fol. 230] A. In the first step, 207. Q. What about the third step?

Q. And were any settled in the fourth step?

A. Thirty-five ones with an amen' value overed of appleant tou

Q. Did any go to arbitration?

A. One went to arbitration and we won it.

Q. Now, when you say a case is settled in a certain step, what do you mean by settled?

A. That they were settled to the satisfaction of the union.

mits his ease to be handled Q. And in other words, does the company control whether or not the case goes to the next step?

A. No. We determine that.

vadi 3) past real fullmov By Mr. Panethiere: [fol. 231]

anima toff the toff to that a milian

Q. Have you had any discussion with Mr. Owens since the fourth step! missend dosesson, but one Jast seems with

their file a gricyance that is not proposed?

was filed by an engleye.

sight in one of the sleps.

A. No.

Q. And you did receive some correspondence from Mr. Owens's attorney prior to the fourth step, did you not?

A. I did.

Q. And you knew, and the union knew prior to the fourth step of the grievance procedure that he had engaged an Q. At any particular stage, or -attorney?

A. Went did a ton at it tent routing too built ow and W. A.

Q. And with those facts in mind, it was still decided not to go to arbitration?

A. Yes, wond for all right mulband manual with it notage

- Q. And do you know on what basis it was decided not to go to arbitration to ob tagt belit seems to Jot's even ev. . .
- A. We did not feel that we had sufficient medical evidence to win the case before the arbitrator.

Q. When a decision is made on whether or not to proceed to arbitration, does the grievant, or the man who filed the grievance, does he have to agree to it!

A. No. sir.

[fol. 232] Q. Is that standard practice?

A. That is standard.

Q. Why has that practice developed?

Mr. Browne: Now that is objected to as argumentative, not tending to prove any issue in this case.

The Court: Overruled.

By Mr. Panethiere:

Q. Why has that practice developed?

A. Well, the employe who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case or we don't have a case. Then the union makes the decision, and the reason for that is that a union wouldn't last long if they had to arbitrate every case that was filed by an employe.

Q. In your capacity handling grievances, are there any grievances that are not processed, does an employe some-

times file a grievance that is not processed?

A. Any grievance filed is processed to a conclusion. It is either either receive a favorable or an unfavorable decision in one of the steps.

Q. Does the union ever withdraw any grievances?

A. A lot of them, yes.

Q. At any particular stage, or-

A. When we find out either that it is not a violation of the master agreement or we cannot—we can't win the case. [fol. 233] Q. Are there any grievances filed which in the opinion of the people handling them do not have merit to

A. We have a lot of cases filed that do not have merit.

- Q. Now, it was felt, was it not; that the Ben Owens case did have merit to be processed to the fourth step!
 - A. Yes.
- countent did not singuite, didn't vent-Q. Have you had any discussion with the president and the general counsel of the national brotherhood with reference to this case after suit was filed?
 - A. I have.
- Q. And what was their position on proceeding with this case after they received notification of the suit?

Mr. Browne: That is objected to as self-serving, calling for hearsay, not binding on the plaintiff in any way.

. The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. Our national attorney and national president, after reviewing the facts of the case, advised me that the case should be withdrawn.

Mr. Panethiere: You may inquire.

Cross examination.

By Mr. Browne:

Q. Did the national president and the national attorney. whoever you say it was that gave you such a decision, seethese five statements from-

A. Yes, sir.

[fol. 234] Q. doctors who were not questioned by the company?

A. Yes, sir.

Q. And you saw those five statements from these doctors who were not questioned by the company, did you?

A. You gave them to me, sir.

Q. I gave you copies, did I not, photostatic copies?

A. That is right.

Q. That was before the fourth hearing!

oak Yes O red will laid ton it saw yes apa

Q. So you knew all about what these doctors that the company did not dispute, didn't you,

A. Yes, sir.

Q. -you knew what they would say, and you knew also from talking with the local people that these were reputable physicians, didn't you?

A. Yes.

Q. Yes, and yet you decided in the union management that notwithstanding those five statements that the man was qualified to go back to regular work that he did not have a case you could win before the first neutral arbitrator, is that true?

A. I did not think we could win the case.

- Q. And you never at any time submitted his case then or recommended his submission to any neutral arbitrator, did
- A. I did not recommend this case to arbitration at any time.
- Q. The only presentation of Benny Owens' case that the union officials ever made was to the company officials for [fol. 235] their decision, right?

A. We have been doing that for years; yes, sir.

Q. I say that in this case was true, wasn't it?

A. That's right.

Q. And on May 8, 1964, about five weeks ago, Benny Owens was not notified of the time or place of this hearing, was he?

A. To my knowledge he was not.

Q. And Benny Owens was never notified of the result of this, what you call a hearing in the fourth step, was he?

A. To my knowledge he was not. I had no contact with Mr. Owens.

Q. Actually, of course, at all times you are acting for the national union and local union?

A. That's right.

Q. As its official, aren't you?

A. That's right.

- Q. And do you recall receiving letters from me, sir, onwell, these several dates you have heard in the case, haven't yout biss weetab own weet to mis surey too tent
 - A. Yes.
- Q. That I have presented to the jury, but I am particularly interested in these after the hearing of the fourth step. You remember receiving the originals of these, don't you! Tarney you I mit weigh good and off an June thou
 - A. Yes.
- Q. And one on November 25, 1960 particularly where I wrote you, "Please advise the results of the fourth step of [fol. 236] the grievance procedure held on November 16. 1960"†

m nor qualified to dook at Alvo.

- A. Yes, note struct out to where you now would Q. Then this is your letter, Exhibit 6, isn't it?
- A. Yes.
- Q. Where you said it is still open?
- A. That's right in a free an vasceing od to day busiered as
- Q. Pending further physical examination to Mr. Owens?
- A. Correct.
- Q. But at that time you had in your file these five doctors. that said he was able to go back to regular work, didn't you! remail whist forsome with
- A. Yes, and there were some doctors who said he was not. too.
- Q. I know. But that made an issue, didn't it, that you could very well submit to an arbitrator for a decision, is that true! bue sitve senions sove O nine and is a them
 - A. But it wasn't necessary to do so.
 - Q. You decided-
 - A. I decided that that ofther ... tadt bebised A.
- Q. -it was not necessary. But with five doctors not questioned by the company on Benny's side, and two dectors on the other, you still say that that was not a case that should be submitted to the only neutral arbitrator in the matter?
- A. And I think it was a good decision. I can still see Mr. Owens.

· Q. Do you recall-did you know that Mr. Owens-did you hear him testify about the kind of work he has done in [fol. 237] the four years since these two doctors said if he worked he would die?

A. Yes. I am sure glad he didn't.

Q. Yes. And you say that now that in your opinion from looking at him that you don't think he is able to do a hard day's work such as he has been doing for four years?

A. I am not qualified to look at Mr. Owens and say

whether or not he can work.

Q. All right. Now, you recall my writing you again, do you, December 14, 1960, Exhibit 5-

A. Yes.

Q. —asking you the results of the fourth step, or if you planned to go further, you recall that letter, don't you?

A. Oh, yes. .

Q. And you recall my saying that Mr. Owens does not understand why the company doesn't put him back to work in view of the strong medical statements?

A. Yes.

Q. And then you didn't answer that letter, did you?

A. No, I didn't.

Q. No. And then I wrote you another letter January 5, 1961, you remember that, Exhibit 4, of course, don't you?

A. Oh, yes.

Q. Yes, in which I asked you again, "Please advise whether the union contemplates any further action on the matter of Benjamin Owens against Swift and Company. [fol. 238] Please refer to our letter of December 14, 1960."

A. Yes.

Q. And you didn't answer that either, did you? A No. not sout direct

Q. In fact, you haven't answered anything since then, since this letter that I showed you, Exhibit 6, have you, sir? he only neutral britishinson As

Mr. Browne: All right. That's all.

Redirect examination.

antical of at a representative By Mr. Panethiere:

Q. Mr. Kobett, Mr. Browne keeps referring to these unchallenged medical reports, unquestioned. What did the company tell you about these medical reports?

A. That they were not acceptable because they were not

full examinations, that they were only blood pressure.

Q. Did they tell you that they were not questioning the qualifications of these doctors?

A. Yes.

Q. They wanted something besides a blood pressure reading and a one sentence report?

A. That's right.

Q. Did they show you three and four page medical reports on this man from K. U. Medical Center?

A. Yes, sir.

Q. You also saw Dr. Day's report after it was received?

A. Yes, sir.

Q. You made a comment that you could still see Ben here. What do you mean by that?

A. He's still alive. Had we acted differently maybe he [fol. 239] wouldn't be. Nobody knows.

Q. That's beyond our province,

Mr. Browne: Now, we object to that last statement as argumentative, and move it be stricken and the jury instructed to disregard it.

The Court: The jury will disregard that.

By Mr. Panethiere:

Q. Did you have any personal animosity toward Mr. Owens! And I gave them to you

A. No, sir.

Q. Do you know of anybody in the local that had any animosity towards this man? A. No, sir mempa ner and dist on the burne, I but und

Q. As a national officer, what are your responsibilities with reference to the individual members?

A. Say that Mr. Owens would have had correspondence with me saying that the local was not doing their job, in following the steps of the grievance procedure, I would have contacted the national president and we would have sent somebody in there to see why they weren't doing their job.

Q. But you never received any communication directly from Mr. Owens, have you?

A. No, I have not:

Q. You did receive a letter from his attorney prior to the fourth step, did you not?

A. I did.

Mr. Panethiere: Nothing further.

Recross examination.

By Mr. Browne:

Q. Well, do I get from that that because Mr. Benny [fol. 240] Owens went to a lawyer to try to get his rights for him that you wouldn't recognize the claim on that account? Is that what you mean?

A. I would make every effort to see to it that Mr. Owens

got his rights, regardless.

RQ. Yes. att but namers.

A. And I did so.

Q. You didn't object to my trying to help Benny when I furnished you these copies?

A. I accepted them, sir.

Q. You called me on the phone, didn't you, and asked me?

A. I did, sir.

Q. And I gave them to you?

A. I did, sir.

Q. And I told you that I hoped that you would represent him and I wouldn't go with him. You remember that?

A. That's right.

- Q. And actually now you mentioned a doctor that the company referred to, that was Dr. Morris, wasn't it, Dr. Morris from the University of Kansas Medical Center
- A. Yes, to silened bely set the up on the third afterbasis · Q. And you are familiar with this exhibit offered by the defendants, 21, in which it says in their exhibit that Dr. Morris never even saw the man, "Dr. Morris did not know Ben Owens and had never seen him, nor had he prescribed." Did you know that was in these papers of the union?

A. I had a copy of them.

[fol. 241] Q. And that that was the doctor upon whom the company was relying in fighting this claim, you knew that, didn't you! Sir!

A. I knew what was in the fact sheets.

Q. So taking the statement that the company furnished you of a doctor who admittedly had never seen Benny Owens against five statements by a medical officer whose integrity was not questioned, or qualifications, by the company, that he was regularly qualified—I mean qualified to go back to regular work, you decided that you couldn't make a case in the fifth step, is that it?

A. I decided that it would not be to our advantage to go

to the fifth step with the evidence I had.

Mr. Browne: That's all I have.

Redirect examination.

By Mr. Panethiere:

Q. Mr. Kobett, I have one question here, maybe Colonel Browne didn't read this correctly, he was reading here from alleged facts presented by the union and not agreed to by. the management, isn't that what he was reading from? Decause vid heard granted .

Q. Did the union say—did the union bring up that point that this doctor had never seen Ben Owens?

All Yes rigrace with robert green brief in Lach

Q. That was the union's argument, is that right?

A. That was our argument, of course, I wasn't going to [fol. 242] say, I don't know whether it's a fact or not, but we argue the case the best we know how, might twist it around a little bit but we do it for the benefit of our members.vd house to tidi

Mr. Panethiere: Thank you.

Recross examination.

By Mr. Browne:

Q. So you threw your own argument in the wastebasket when you were deciding that you would not go on to the fifth step, is that it?

A. After we seen Dr. Day's report we withdrew the case.

- Q. I am talking about Dr. Morris, the company's doctor, who in your statement says that he never had seen the man. You adopted that, didn't you?
 - A. We held the case open in the fourth step.

Q. Until_

- A. And had Dr. Day's report been the opposite of what it was, we would have went to the arbitrator without reser-
 - Q. You held it until five weeks ago, didn't you?

A. Yes, sir.

Mr. Browne: That's all.

Redirect examination.

By Mr. Panethiere:

Q. Now, this matter of holding it, Mr. Kobett, why was the case held so long?

the management, isn't that what he w A. The case was held because we were grasping for straws, trying to get Mr. Owens back to work. Once we dispose of it, withdraw, they could have withdrew it in the [fol. 243] second or third step under the contract, they was the union's argument; is that right had

didn't do it, they tried to, they kept it open so that we could try to get Mr. Owens back to work. That was our objective but we wanted to get him back to work and we didn't want anything to happen to him after we got him back to work, we wanted to be sure also that he was physically able to return to his regular employment.

Q. Now, the union could have dropped it at the fourth

step, couldn't it?

A. Absolutely.

Q. After the fourth step meeting, they could have dropped it and closed the case right there?

A. That's it.

Q. Instead they held it open?

A. Right.

Q. Did you have any discussion about the rehabilitation and obtaining both disability and social security for Mr. Owens?

A. It was discussed at the President Hotel at that fourth step meeting.

Mr. Panethiere: Thank you.

Recross examination.

By Mr. Browne:

Q. And do you say, sir, that there is no significance in your attempting to withdraw, or withdrawing this grievance in the fourth step after this case had been sent out last month for trial, that that's just a coincidence, that you attempted to withdraw it then?

A. I would say it was a coincidence for this reason, that [fol. 244] we did have a meeting scheduled in Kansas City, and we like to review the cases that are being held and dis-

pose of them if possible.

Q. Did you have quite a few meetings in the four years almost intervening between when you started to hold it and when you attempted to withdraw it?

A. We have a lot of meetings.

Q. Yes. You have been down here hundreds of times in between, haven't you?

A. Oh, I wouldn't say hundreds of times, sir.

Q. Well, make it dozens, is that all right?

A. That's close.

Mr. Browne: That's all,

Redirect examination.

By Mr. Panethiere:

Q. I have one further question, Mr. Kobett. Did the setting of this—when were you first notified this case was going to be tried starting yesterday?

A. I was notified by you by telephone Tuesday evening

at six-fifteen.

Q. And did the setting of this ease have anything to do whatsoever with the disposition of the Benny Owens grievance in the fourth step?

Mr. Browne: That's objected to as argumentative.

Mr. Panethiere: You opened the door.

Mr. Browne: Invading the province of the jury.

[fol. 245] The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. It was a coincidence, I didn't know whether this case was coming up today or a month from now until I got your telephone call.

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our attorapting to withdraw, or a

Mr. Panethiere: Thank you, sir.

Mr. Browne: That's all.

(Witness excused.)

Mr. Panethiere: The defendants rest, Your Honor.

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The Court: Is there rebuttal?

Mr. Browne: Yes. and reductions of the control of t

Indi 30 norqueza ad dire. REBUTTAL EVIDENCE

Benjamin Owens resumed the stand.

Direct examination.

By Mr. Browne:

Q. You are Benny Owens and you have previously testified in this case?

A. I did.

Q. Benny, I have made several notes here of the evidence as it has gone along and I want to ask you about some of these things. I will ask you about whether Dr. Day said, in your hearing, at any time, that you were not able to go to work?

A. No, not in, not in, not in my presence.

Q. All right. I will ask you whether or not Mr. Jamerson said that you were able to work, in his opinion? [fol. 246] A. Yes.

Mr. Panethiere: Your Honor, I object to that question as hearsay.

The Court: Overruled. In his presence! Overruled.

By Mr. Browne:

Q. I will ask you concerning—oh, whether you knew Dr. Day at all before you went over to his office?

A. I never seen the man, nor heard of the man in my life.

a

Q. So did you know whether the company liked him or didn't-I mean whether he liked the company or didn't like the company? Did you know either way?

A. I did not know because I didn't even know the man.

Q. Are you able to, and were you at all times during your employment with the company, and with the exception of the time when you took this sick leave, or leave, or whatever you call it, temporary leave, during that time, all the time you were working, with the exception of that time off, could you go up steps and down steps all right?

A. Oh, yes.

Q. Could you go in and out of cold and hot places all right?

·A. Sure.

Q. Did you!

A. I did.

Q. And have you since then?

A. Yes.

Q. Have you gone upstairs freely and downstairs?

A. I have gone upstairs and trimmed trees and cut trees and topped trees simply because that's the way I am [fol. 247] making my living now. I got no other way to make it.

Q. And heaving those big, I mean those heavy sacks up seventeen high, did you do that?

A. That's right.

Q. All right. Did you ever know until this day that the union officials had attempted to withdraw your grievance in the fourth step?

A. No. I didn't.

Q. Did anybody tell you of any meeting on May 8th of this year?

A. No.

Q. Or any-or did they notify you of the result of any such meeting?

A. No.

Q. Until you heard it on the witness stand here?

A. That's right.

Q. Now, as to this three hundred dollars, I will ask you whether or not you and Mr. Jamerson did have a conversation that involved the sum of three hundred dollars, and if so, what it was!

A. I did.

Q. Tell the jury what it was a second and but

- A. Concerning the three hundred dollars, Mr. Manuel asked me for three hundred dollars to represent me. I told him-He a seil whiled I vonword old.
 - Q. Mr. Who did?

A. Mr. Vaca.

Q. Manuel, you are talking about?

A. Mr. Manuel.

Q. All right.

Mr. Panethiere: Do I understand you right, you told this to Mr. Jamerson! [fol. 248] Mr. Browne: No, he didn't tell—

Mr. Panethiere: Just a minute

By Mr. Browne:

Q. Now go ahead and tell what you did-.Mr. Panethiere: Let me have the reporter read the question back, and but avenue and avent tost

(Question read as follows: "Question: Now, as to this three hundred dollars, I will ask you whether or not you and Mr. Jamerson did have a conversation that involved the sum of three hundred dollars, and if so, what it was !")

By Mr. Browne izorden sell tenine per nov off to

Q. Now, I am asking you about your conversation with Mr. Jamerson. You have told about your conversation with Mr. Vaca. Now tell the jury about your conversation with Mr. Jamerson.

A. Yes. I told Mr. Jamerson that Mr. Vaca asked me for three hundred dollars to represent me in the arbitration and I told Mr. Jamerson, I says, "I won't give it to Mr. Manuel," I says, "but I will give it to you because I trust you more than I will Mr. Vaca."

Q. What did Mr. Jamerson say?

A. Mr. Jamerson says, "No," he says, "I couldn't do that."

Q. Did he say you had to give three hundred dollars to anyone?

A. No, he said I didn't have to.

Mr. Browne: I believe that's all.

[fol. 249] Cross examination.

By Mr. Panethiere:

Q. Mr. Owens, just one point here. Mr. Vaca wasn't here yesterday, I want you to relate where this incident took place and the words that were said by Mr. Vaca to you with reference to the three hundred dollars.

A. I asked Mr. Vaca was he going to represent the

case,—

[fol. 250] Q. And what did he tell you?

A.—to the arbitration. He says no, that the union was broke and he did not have the money. And he asked me, he says, "You let me have three hundred dollars and I will represent the case."

Q. And where did this take place, this conversation?

A. It taken place between the packing house and the union hall.

Q. Do you remember the approximate time!

Mr. Browne: I didn't hear the question.
Mr. Panethiere: The approximate time.

A. It was around noon.

By Mr. Panethiere: gosmand all blut ...

Q. With reference to the fourth step meeting, when did

on with Mr. Jainerson.

A. With reference to the fourth step meeting!

Q. Yes, the survey sint military, you may this hark of A. That was after the fourth step meeting.

Q. How long after?

A. Somewhere between the last of January and the first of February, somewhere in the neighborhood.

Q. Was that after you had been to Dr. Day!

A. No. I hadn't been to Dr. Day at that time.

Q. You didn't even know Dr. Day, did you?

A. Never seen the man in my life.

Q. But didn't you testify on direct examination or crossexamination yesterday that your own doctor. Dr. Hesser [fol. 251] recommended Dr. Day to you as a highly impartial and a very skilled practitioner in heart disease?

A. No. he recommended-Dr. Hesser recommended to the union, the union is the one that told me.

Q. The union told you what, Benny!

A. The union told me that—now, I picked Dr. Hesser myself, I picked him, Dr. Hesser, I picked him for this examination. When I got to Dr. Hesser Dr. Hesser told me. he say, "I am sorry," he say, "I am not a medical doctor." he say, "I am a surgeon doctor. That's what I am. For that reason I can't handle this case, I can't handle this examination," he say, "but I will recommend another doctor."

Q. And who was that?

A. Who the doctor was, I did not know.

Q. You didn't know the doctor?

A. No.

Q. It was Dr. Day, wasn't it?

A. It was Dr. Day, I wind up with Dr. Day.

Q. Now, this Dr. Hesser you are talking about is the same doctor here, H. H. Hesser!

A. That's right.

Q. That wrote a medical report, signed March 24, 1960?

A. That's right.

Q. And he told you that he wasn't qualified to give you a complete medical, didn't he?

A. That's what he told me.

Q. And still you are wanting this jury-[fol. 252] A. He said he take blood pressure, he say, "I can read blood pressure and so on but," he said, "this other when it comes to heart and this and that and the other, I don't know nothing about it because I am a surgeon doctor."

Q. But still you wanted the jury here to believe that

this was a complete medical report.

Mr. Browne: That is objected to as argumentative. · The Court: Sustained.

By Mr. Panethiere:

Q. Now, wasn't that one of the matters that were discussed and one of the problems the union had was that the company didn't consider these complete medical reports, just like Dr. Hesser told you, wasn't it?

A. I heard them talking it here.

Q. Pardon?

A. I heard it here.

Mr. Browne: I didn't get that answer. Mr. Panethiere: He heard it here.

By Mr. Panethiere:

Q. Isn't it a fact these were not complete medicals, you just went in and had a doctor take your blood pressure?

A. I don't know, I ain't no doctor.

Q. Well, you know what you told the doctor when you went in there that day, didn't you!

A. The argument was down to Swift's that my blood pressure was too high. That's all it was to it.

Q. All right.

A. That's how come the man wouldn't put me back on [fol. 253] the job, he claimed that my pressure run 300, run so high that he couldn't take it, and I walked right out of his office and go to these people and these people found it altogether different. That's how come I got so many of them and—

Q. Mr. Owens, let me ask you a question. You would walk in to a doctor and all you would tell them to do was to take your blood pressure, wasn't it? Is that correct?

A. That was all the man told me, that was the argument, he said my pressure was too high to work. What shall I do? He didn't tell me nothing wrong with my eyes or heart or so on, the whole argument was the blood pressure.

Q. Are you testifying that you don't have a heart con-

dition, Mr. Owens?

A. I just stated in my statement I have had high blood pressure, slightly heart trouble, which I was born with, which I don't know nothing but that, that's all, simply because I was born with it.

Q. Now, when you go in to a doctor and ask him to take your blood pressure, would you tell him that you had a

congenital heart condition?

A. How would I know?

Q. You just testified that you have, Mr. Owens.

A. Well, they done told mer

Q. I mean these doctors from whom you got these blood [fol. 254] pressure readings in a sentence here that they have examined you to go back to work, did you tall them you had a congenital heart condition?

A. Am I going to tell who?

Q. The doctors?

A. This is his job to find out. I ain't supposed to walk in there and tell this doctor that I got no—if I knew that I wouldn't have to go there.

Q. Are you stating that you don't have a heart condition?

A. No, sir. I told you all the way through that I have had it practically all of my life, I suppose, according, according to the doctor. He told me, "Don't worry about it," he said, "Don't worry about it just because you have had it all your life—"

Mr. Panethiere: I object to this—

Mr. Browne: He is trying to answer you and you are interrupting him.

Mr. Panethiere: I object to the answer as not respon-

sive to the question, Your Honor.

Mr. Browne: You don't want to hear it.

The Court: Proceed.

By Mr. Panethiere:

Q. My question is simply this, you know you have got a heart condition, you have stated, you have testified that you have had it since you were young.

A. I was born with it.

[fol. 255] Q. You were born with it.

A. All my folks died with it.

Q. Now, when you would go in to these doctors to get a blood pressure reading, did you tell them you had a bad heart?

A. Why should I?

Q. Thank you. That's my—that's the exact answer.

A. If I am sick I am going to him for help.

Mr. Panethiere: Thank you. I have no further questions.

[fol. 256]

EVIDENCE CLOSED

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(Whereupon, the following proceedings were entered of record in chambers, out of the presence and hearing of the jury:)

DEFENDANTS' MOTION FOR DIRECTED VERDICT AT CLOSE OF EVIDENCE OVERBULED

The Court: Let the record show that the defendants' motion for directed verdict at the close of the entire evidence is by the Court overruled.

RECORD IN CHAMBERS IN RE OBJECTIONS TO INSTRUCTIONS

The Court has marked as given Instructions No. 1, which is the approved Missouri Instruction 1.01; Nos. 2, 3 and 4, offered by the plaintiff; and Nos. 5, 6, 7, 8, 9 and 10 offered by the defendants:

The Court has also marked as given Instruction No. 11, which is the Missouri Approved Instruction 1.02; and 12,

the Forms of Verdict Instruction.

Mr. Panethiere: Just a general objection, Your Honor, to the Instruction No. 2, based on the fact the instruction hypothesizes too many facts not in issue, Your Honor, and hypothesizes evidence not adduced from the witnesses presented by the plaintiff.

[fol. 257] Mr. Browne: Plaintiff respectfully objects and excepts to each and all instructions given by the Court at the request of the defendants and of its own motion, the

instructions being 5 through 11.

COURT'S INSTRUCTIONS AND OBJECTIONS THERETO

(Whereupon, the following proceedings were entered of record in the courtroom, in the presence and hearing of the jury:)

(Whereupon, Instructions Nos. 2 through 12 were read to the jury by the Court:)

Instruction 2

The Court instructs the jury that, if you find and believe from the credible evidence submitted for your consideration and from the reasonable inferences directly deducible therefrom, if any, that defendants Vaca, Mooney & Kobett, at the time of filing of the petition in this case, February 13, 1962, were officers and members of the National Brotherhood of Packing House Workers, if so, a labor union, and that the members of said labor union, at said date, were very numerous so that it was then impractical to bring them all before the Court and that naming said defendants

fairly insures adequate representation in Court in this case of all the members of said union and of the rights of said labor union and its members, if so, and that said defendants have been fairly so chosen as such class representatives of said labor union, if so, and if you further [fol. 258] find, that, at all times herein mentioned, said labor union and its members were acting through said defendants, if so, and that in such actions, if any, said defendants were acting within the scope of their employment as such officers, if so, for said labor union and its members, and, if you further so find that during the period from September 1, 1959 to September, 1961 plaintiff was a member of said labor union and an employee of Swift & Co., and that said labor union was designated by contract as the agent, if so, for plaintiff and other members of said union in matters involving grievances of such members against said employer arising from such employment and that any differences, disagreements and local trouble incident to the employment relationship would be handled through the grievance arrangement provided in said master agreement contract, which included five grievance steps, if so, including reference beyond the fourth step by said union, of such grievance to a named arbitrator, if so, for arbitration, and if you further find that from January 8, 1960 on, if so, said employer refused to allow plaintiff to be restored to his job following sick leave, if so, on the asserted claim by such employer that plaintiff was notphysically fit to hold said job, if so, and that said claim was false and wrongful in that it was not based on fact, if so, and that, under said master agreement, said employer was required so to restore plaintiff to said job if he was physically fit, if so, and if you so find that at such date, [fol. 259] and thereafter, he was so physically fit, if so, and that said restoration to said job was to displace, if necessary, employees junior in service to plaintiff, receiving the unskilled labor rate, and that said employer refused to displace such junior employees, if any, and to restore plaintiff to his job, if so, or to recall plaintiff to his original

department according to his seniority, when gangs were increased by calling back employees, if so, and refused to pay plaintiff for time lost by improperly refusing so to restore him to such employment, if so, and if you further find that plaintiff requested said emplayer for such restoration, but was so refused, if so, and that said employer therein breached said master agreement, if so, and that plaintiff had thereby a grievance against and disagreement and difference with employer, by reason of the master agreement, as mentioned herein, if so, and if you further so find that plaintiff thereafter requested said labor union as his agent. if so, as herein mentioned, to carry his difference, disagreement and grievance through all necessary steps, including the fifth step, if so, arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects, and that said labor union thereby, if so, directly caused actual [fol. 260] damage, if any, to plaintiff, then it becomes your duty as jurors to find for the plaintiff, Benjamin Owens, and against the defendants as representatives of said labor

Given JDM, J.

Instruction 3

If you find the issues for the plaintiff, Benjamin Owens, and against the defendants, as elsewhere mentioned in these instructions, it then becomes your duty to award the plaintiff such sum, if any, as you may find and believe from the credible evidence submitted for your consideration and from the reasonable inferences directly deducible therefrom, if any, will fairly and justly compensate the plaintiff for any actual damages, if any, by loss of work, if any, you so find and believe he sustained as a direct result of the wrongful actions, if any, of defendants, as elsewhere mentioned in these instructions.

Given JDM, J.

The struction 4 and to an analysis

If you find the issues in favor of plaintiff, as elsewhere mentioned in these instructions and if you so find that he so subtained actual damages, if any, and if you believe the conduct of defendants was willful, wanton and malifol. 261] clous, if so, then, in addition to any damages to which you find plaintiff entitled under Instruction No. 2 and 3 you may award plaintiff an additional amount as punitive damages, in such sum as you believe will serve to punish defendants and to deter them and others from like conduct.

Given JDM, J.

from the little and Instruction No. 5 and an industrial

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you fir and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff.

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Instruction No. 6

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you do not believe that defendants did maliciously, arbitrarily, wantonly or wrongly act as submitted to you in Instruction No. 2.

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marker out his war of Instruction No. 7 and the another and

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you find [fol. 262] and believe from the evidence that plaintiff did not sustain any damage from the actions of the defendants.

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mentioned in these instructions of so on it

Given JDM.

Instruction No. 8

The Court instructs the jury that you are to determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of this suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statements, and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive.

Given JDM, J.

Instruction No. 9

The Court instructs you that it is your duty in considering the evidence, deliberating upon and determining the facts in this case to first decide upon the question as to whether, under all the facts, and circumstances, the de-[fol. 263] fendants acted arbitrarily, unreasonably, wantonly or maliciously as charged by the instructions of the plaintiff herein. Until and unless you determine there was such action on the part of the defendants, you should not give consideration to the amount, if any, that plaintiff might be entitled to recover because of any injury sustained as a result of such actions.

It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life. There is no technical rule; there is no limitation in courts of justice that prevents you from applying to them (the facts and circumstances in evidence) just the same rules of good common sense, subject always, of course, to the conscien-

of guelt witness is

tious exercise of that common sense that you would apply to any other subject that came under your consideration and that demanded your judgment. Neither passion, prejudice, or sympathy for or against plaintiff or defendants should influence you in any manner in deciding this case.

Lie golde sibling of the salet when the Given I JDM, J. Count

Instruction No. 10

The Court instructs the jury that the burden is upon the plaintiff to prove his case by a preponderance or [fol. 264] greater weight of the credible evidence, and unless the plaintiff sustains such burden your verdict will be for the defendants. give the testimony of

Chomidael and a Given JDM, J. may

Instruction No. 11

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are. and Suith ansated time angle pairer Given JDM, J.

sh and secondary Instruction No. 12 for rebut white

You are instructed that nine or more jurors may render a verdict for either party in this case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors. who agree to it, and in that case you should use the words, "We, the undersigned jurors, find", etc.

Forms of Verdict

Do variationa do If you agree upon a verdict for the plaintiff for actual damages, it may be in the following form:

We, the jury, find the issues for the plaintiff and do becasses his actual damages at (stating the amount)

[fol. 265] If you agree upon a verdict for the plaintiff for punitive damages, you may add the following to your verdict: oanso aid in suavend and and and

"And do further find the issues for the princiff for punitive damages and do assess his punitive damages Dollars (stating the amount) in addition to his actual damages."

If you agree upon a verdict for the defendants, it may be in the following form:

"We, the jury, find the issues for the defendants"

These Forms Are Given for Guidance Only and Your Verdict Should Be Written on a Separate Paper and Not on One of These Instructions.

> Given JDM. J. HOME

VERDICT

(Whereupon, counsel for plaintiff and counsel for defendants, respectively, argued the case to the jury; the jury retired to consider their verdict and after due deliberation returned in to court the following verdict:)

"We, the jury, find the issues for the plaintiff and do assess his actual damages at seven thousand dollars. And do further find the issues for the plaintiff for punitive damages and do assess his punitive damages at thirty three hundred dollars in addition to his actual damages.

(Signed) William H. Whittington the other dines, the law and the evi-

unit between the

[fol. 266] JUDGMENT ENTRY

Wherefore, it is ordered and adjudged by the Court that plaintiff have and recover of and from defendants, and each of them, the sum of Seven Thousand Dollars (\$7,000.00) actual damages and the further sum of Three Thousand

Three Hundred Dollars (\$3,300.00) for punitive damages, being a total of Ten Thousand Three Hundred Dollars (\$10,300.00), together with the costs of this cause, and that execution issue therefor.

MOTION OF DEFENDANTS FOR JUDGMENT IN ACCORDANCE WITH THEIR MOTION FOR A DIRECTED VERDICT FILED AT THE CLOSE OF ALL THE EVIDENCE, AND; IN THE ALTERNATIVE, A MOTION FOR A NEW TRIAL

Come now the defendants and, pursuant to the Missouri Rules of Civil Procedure, move the Court to set aside the verdict and judgment entered thereon in this cause and to enter a judgment in favor of the defendants, in accordance with their motion for a directed verdict filed and orally made at the close of all the evidence or, in the alternative, to grant the defendants a new trial, all for the following reasons:

- 1. Because the verdict is against the law.
- 2. Because the verdict is against the evidence.

[fol 267] 3. Because the verdict is against the law and the evidence and against the greater weight of the credible evidence.

- 4. Because plaintiff failed to prove, by substantial evidence, a claim or cause of action upon which relief might be granted against these defendants.
- 5. Because plaintiff failed to prove, by substantial evidence, any wrongful, malicious, wanton or otherwise unlawful action against the plaintiff by these defendants.
- 6. Because under the pleadings, the law and the evidence, plaintiff was not entitled to relief or to recovery against these defendants.
- 7. Because the Court erred in overraling and denying defendants' motion for a directed verdict made at the close of all the evidence of all the evidence.

- Because plaintiff failed to prove that the actions of the defendants here were in any manner wrongful, or arbitrary without just cause or excuse.
- 9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive pri-[fol. 268] mary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the State of Missouri.
- 10. Because under the pleadings, the law and the evidence, the essence of plaintiff's alleged cause of action arose in the State of Kansas on January 8, 1960, and that plaintiff did not file his petition until February 13, 1962, which was more than two years subsequent to the former date, and that as a consequence thereof plaintiff's alleged claim is barred by the two year statute of limitations of the State of Kansas, under the provisions of Kan. G.S., 1949, 60-306, third clause.
- 11. Because the Court erred in giving Instruction No. 2 at the request of plaintiff, over the due and timely objections and exceptions of defendants, in that said instruction is erroneous in the following respects and particulars:
- (a) Because there was no evidence presented that plaintiff was an employee or a member of the union from the period September 1, 1959, to September 1961;
- (b) Because it instructed the jury that the defendants were designated by contract as plainting agent in matters involving grievances of such members against said employer arising from such employment and that any differences; disagreements and local trouble incident to the employment relationship would be handled through the grievance arrangement pro-

which included five grievance steps, if so, including reference beyond the fourth step by said union, of such grievance to a named arbitrator, if so, for arbitration... and that such constituted a misdirection to the jury because the collective bargaining agreement actually states that a grievance "may" be so referred and that the jury was instructed in such a manner as to lead them to believe that once the fourth step was completed that the fifth step "must" be taken, which is clearly not the case;

- (c) Because it assumes that plaintiff was physically fit at the time of the action of the company and the union and that there was no evidence supporting this issue;
 - (d) Because it assumed facts not in evidence with regard to job displacement to which there was no evidence adduced;
 - (e) Because it did not require a factual finding as to what manner the plaintiff was allegedly prevented from completing pursuit or completion of his administration remedies, and therefore constituted an abstract submission which was confusing and gave the jury a roving commission;
 - (f) Because it did not require a factual finding as [fol. 270] to what was "wrongfully" "arbitrarily" and "without just cause or excuse" in the defendants' alleged refusal to carry the grievance through the fifth step, and that such constituted an abstract submission which was confusing, a positive misdirection, a failure to hypothesize the attending circumstances of the facts, and permitted and allowed the jury to make its own determination as to the constituent elements which make up the same and gave the jury a roving commission;

be handled through the grievence arrangement pro-

- (g) Because there was no evidence presented that defendants in any way "wrongfully", "arbitrarily", and "without just cause or excuse" refused to carry out the grievance referred to in the instructions;
- (h) Because it erroneously assumed that the result of an arbitration proceeding would have been the restoration of the job and seniority rights to plaintiff, and that no such assumption could possibly be made without further proof and evidence showing that a hearing was held and such a determination was reached or likely to be reached, and that such an instruction was a positive misdirection, was confusing to the jury, and gave the jury a roving commission;
- (i) Because the instruction is inarticulate, confusing, not understandable to the jury, and misleading in that:
- [fol. 271] (1) The instruction is poorly and improperly worded and punctuated, so that the various parts of the hypothecation of facts are eparated and not tied together, and the jury could have found that the facts were submitted disjunctively rather than conjunctively, and that the jury need have found only certain parts thereof rather than all parts in favor of the plaintiff;
- (2) That the instruction predicates defendants' liability in part upon the theory that said restoration to the job was to displace, if necessary, employees junior in service to plaintiff, receiving the unskilled labor rate, and that the employer refused to displace such junior employees, if any, and to restore plaintiff to his job, if so, or to recall plaintiff to his original department according to his seniority, when gangs were increased by calling back employees, if so, and that such is confusing and misleading, constitutes a positive misdirection, especially in view of the fact that there was no evidence whatsoever to support this charge or claim;

- (8) That the instruction is confusing and misseding because the greater part of the same is devoted to allegations as to what the employer has allegedly done, and for which there is no evidence to support the same, and that it is confusing and misleading so as to predicate the liability of the defendants herein [fol. 272] for alleged breaches of the collective bargaining agreement by the employer.
- 12. Because the Court erred in admitting incompetent, irrelevant, immaterial, prejudicial and hearsay evidence offered by plaintiff over the due and timely objection of defendants.
- 13. Because the vardict of the jury is based on guess, speculation and conjecture and is contrary to the facts in evidence, the applicable law, and the instructions of the Court
- 14. Because the verdict of the jury is excessive in
- 15. Because the verdict of the jury and the award of damages is excessive and is a result of passion, prejudice and sympathy for the plaintiff and against defendants.
- 16. Because the verdict of the jury is excessive and contrary to the greater weight of the credible evidence as to the nature character, extent and duration of plaintiff's injuries and damages.

Wherefore, defendants move the court to set aside the verdict and judgment entered thereon and to enter judgment in their favor in accordance with their motion for a directed verdict, or, in the alternative, to grant these defendants a new trial herein.

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there was merevidence whatsoever toursupported is

charge of claim;

[fol. 273] ORDER—Thursday, August 6, 1964

Now on this day defendants motion for judgment in accordance with their motion for a directed verdict filed at the close of all the evidence is by the Court sustained for the reason stated in paragraph 9 of said motion, to-wit:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-smpted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri."

Now on this day defendants' alternative motion for a new trial is by the Court overruled.

NOTICE OF APPEAL TO THE KANSAS CITY COURT OF APPEALS Filed August 12, 1964

whom: it may concern:

Le wholk it may concern;

Notice is hereby given that Plaintiff, Benjamin Owens, above named, hereby appeals to the Kansas City Court of Appeals from the Order of the Honorable J. Donald Murphy, Judge of Division 11, of the above Circuit Court, on August 6, 1964, sustaining the Motion of Defendants for judgment in accordance with their Motion for a [fol. 274] Directed Verdict filed at the close of all the evidence.

Dated August 11, 1964.

This is in occitify that Benjamin Owens, has been examined by me, one of the interest of the second of the contract of the con

His blood pressure is 160/100. It is my opinion he is physically able to perform regular work.

/s/ C. W. Alexander, M.D.

[fol 278] hatti b isrona indicanti --astaO . [file.le]

IN CIRCUIT COURT OF JACKSON COURTY, MISSOURI

banishing him Planser's Exempt 1

[Letterhead of]

DR. JOHN M. GILL Physician and Surgeon Office, 1949 North 5th Street, Kansas City, Kansas

significant tentrology for the compact Line Life 7-6-60

This is to certify that I have taken the blood pressure of Benjamin Owens 7-6-60. The reading Systolic 160. Diastolie 100.

off la atruce at he son has his/s/ J. M. Gill, M.D.

[Letterhead of]

a rel moideas C. W. ALEXANDER M.D. Office 1514 N. 5th St. sal va as laint wed

To whom it may concern:

This is to certify that Benjamin Owens has been examined and found able to resume work.

Notice to Menty wiven 103.01.3 until Benjamin

/s/ C. W. Alexander, M.D.

Murphy: Judge of Division 11, or the above Chemi Court and the fold in mon Letterhead of an Add to taking A mo

a not weltale cisw. Armania and an alcompanion and Physician & Surgeon

1514 North Fifth Street, Kansas City 1, Kansas

1964. Il taran A748-60

To whom it may concern:

This is to certify that Benjamin Owens has been examined by me.

His blood pressure is 160/100. It is my opinion he is physically able to perform regular work.

/s/ C. W. Alexander, M.D.

[fol. 279] was a relument one said to estam off month star not

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURY

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Topical interest and find the description of the horse of Williams with the same of the sa

MASTER AGREEMENT

that job, providended has some department seniority than the completely whole the sphrayold nor-

describing the NATIONAL BROTHEBHOOD OF PACKINGHOUSE WORKERS

Covering Period Subparamenth-(b) SEPTEMBER 1, 1959 in ad viniqued;

SEPTEMBER 1, 1961

TOTAL SERVICES OF THE SERVICES

the apinion of thes

[fol. 280] SHOVA VPRICAMBLE HOVAH

This agreement is made between Swift & Company (hereinafter called the Company) and the National Brotherhood of Packinghouse Workers on behalf of itself and the Local Unions set forth in Section II (hereinafter, unless otherwise indicated, the word "Union" refers to both National Brotherhood of Packinghouse Workers, and the Local Such differences will be handled through the graves (aroin) cedure in the following manner and order; and it is the

declared policy of the parties bireto that all such that they

PROMOTIONS AND DEMOTIONS

[fol. 282] Physical Disability

(2) If an employe who, in the opinion of the Company, is physically unable to perform his regular assignment or his regular assignments desires to be assigned to a job in his own department paying the same or a lower rate than the rate of his own regular assignment or assignments, he may file with the foreman of the department a written request that he be assigned to such job. Such request shall be on the form set forth in Exhibit IV attached hereto and made, a part hereof. When such job becomes open or vacant for promotion [fol. 283] purposes, such employe shall be assigned to that job, provided he has more department seniority either than the employe to whom the job would normally be given under the provisions of Subparagraph (a) above or than any other employe who has requested assignment to such job under this Subparagraph (b) (2), and further provided that in the opinion of the Company he can perform such job.

[fol. 284]

SECTION XIII

HANDLING OF GRIEVANCES

2. Should differences arise between the Company and the Union or between the Company and employes or between employes of the Company, or should any local trouble of any kind arise in the plant, pertaining to matters involved in this agreement or incident to the employment relation, such differences will be handled through the grievance procedure in the following manner and order; and it is the declared policy of the parties hereto that all such matters shall be settled as promptly as possible.

[fol. 285] First Step

Either:

- (a) The aggrieved employe may present his grievance with or without the Union representative to the foreman of the department, or
- (b) In cases where the Union is the aggrieved or the employe refuses to present his grievance, the em-

ploye Union representative or representatives (not exceeding three (3)), with or without the aggrieved, may present the grievance to the foreman of the department involved.

parties. In making said decision, the Arb

Second Step

If not settled in the first step, then the aggrieved, with or without not to exceed two (2). Union representatives, one (1) of whom shall be an employe of the Company, may present the grievance to the division superintendent or general foreman, whichever is selected by the Company. All grievances presented in this step shall be in writing.

Third Step

If not settled in the second step, then the grievance committee, composed of not more than three (3) Union representatives, two (2) of whom shall be employes, shall meet with the designated committee appointed by the Company, not to exceed three (3) in number, including the plant superintendent or his representative, for the purpose of settling the grievance. The position taken by the Company in this step shall be presented to the Union in writing within five (5) days from the presenting of the grievance in this third step.

[fol. 286] Fourth Step

If not settled in the third step, then either party may refer the grievance to the General Superintendent of the Company or his designated representative or representatives and to the national representatives of the Union to assist in settlement of the grievance. Upon request of the National Union the Company will hold the fourth step grievance meeting in the city of the plant involved. Within 10 days after receipt of a written request from the National Union for a Fourth Step grievance meeting, the parties will set a mutually satisfactory date for the holding of such a meeting.

Fifth Stepsin always 1000 kits proving a nound avelon

If not settled in the fourth step, then the National Union may refer the grievance to Gabriel N. Alexander as Arbitrator, whose decision shall be final and binding upon the parties. In making said decision, the Arbitrator shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance.

[fol. 287]

SECTION XIV

SAFETY, HEALTH AND WORKING CONDITIONS

[fol. 288] Sickness and Accident

- 6. (a) (1) When employes are absent from work because of disability due to sickness or noncompensable accident, and when such absences and their continuation are supported by acceptable medical evidence, part wage payments shall be made in accordance with the terms and conditions hereinafter set forth. The Company agrees that if there is an apparent conflict between the employe's physician and the Company as to the physical ability of the employe to perform whatever work the Company might have available for the employe, the physician employed by the Company will communicate with the employe's physician for the purpose of resolving the conflict.
- (2) All absences shall be considered as starting with the loss of the first full day on which the employe was scheduled to work, provided that where an employe, because of disability due to sickness or noncompensable accident, is obliged to leave work before he has completed four (4) hours of his scheduled work day, his absence shall be considered as starting with that day.

Complete radiuses to present his expressed and some

Service Requirements annual not should dails saufiyed

(b) (1) Subject to the provisions of the following Subparagraph (b) (2), an employe will qualify for payments under this Paragraph 6 if, at the onset of his disability: (e) The greater of cither of odt.

Ifol. 2891

- a. The Company's employment records show that he has one (1) year's accumulated or one (1) year's continuous service; and
- b. He is accumulating service as defined in Paragraph 11, of this Section XIV.

the more favor

the employe, or

Amount of Payment

- (d) The amount of payment shall be a percentage of wages computed in accordance with the following schedule [fol, 290] and on the basis of a forty (40) hour work week at the employe's regular rate of pay or, in the case of employes who have a basic work week either greater or less than forty (40) hours, the percentage of wages computed on the basis of such basic work week at the employe's regular rate of pay f THINK I A TRANSPAR
 - 50% for the first week of disability compensable under this Paragraph 6
- 55% for second consecutive week of disability compensable under this Paragraph 6
 - 60% for third and fourth consecutive weeks of disability compensable under this Paragraph 6
- 65% for the fifth and subsequent consecutive weeks of disability compensable tolder this Paragraph 6.

For absences less than a full work week, daily payments for each day of absence that falls within the employe's weekly guarantee period shall be one-fifth (1/5) of the weekly payment computed as per the above schedule. No

payment shall be made for absence on the employe's sixth or seventh scheduled work day in such week.

Extent of Payments

- (e) The greater of either of the following for any one absence reduced by the payments made for other absences during the twelve (12) months immediately preceding the onset of the current absence:
 - (1) Two (2) weeks at wages figured in accordance with the preceding paragraph for each year of accumulated service or of continuous service, whichever is the more favorable to the employe, or

ffol. 2917

(2) Thirteen (13) weeks at wages figured in accordance with the preceding paragraph.

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In CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

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cial and the result (OA) extrol a to the first of a bad (OA) 1611

there is an array ... PLAINTIPP'S EXHIBIT 3 van lo clar religion

(Letterhead of H. H. Hesser, M. D., Kansas City 1, Kansas)

To WHOM IT MAY CONCERN:

dide sesso and ni are you de our

I have today taken the blood pressure of Mr. Benjamin Owens, 941 Nebraska, Kansas City, Kansas with the following results:

I	nstrume	nt	46.13 40.13.16		Right	Le	P+ "
	aumano		o Height o	S. 1888 - Carlotte M. A. 1888 - C.	22 20 23 7 (2 22 2) C. C. C. C.	ARTHUR AND ADDRESS	12
SPECIAL	Charles and Parkets	Comment of the Parket of the last of the	ashan	THE TANK OF STREET	160/96	162	98
	yees:	THE WOOL	betiers.	Frank / Workston o	164/90	166	96
1	verage:	al barbardista		PART PROPERTY AND	162/93	164,	/97
	insment	rekt dang	数 激生的知	MAIL, BUR	自由其中的	TOTAL DECISION	0.4

Signed on this 24th day of March, 1960.da to was done not

mil lo (dvi) difference of H. H. H. H. H. D. of the above schedule. No. H. H. Hesser, M. D.

Ansountsof Parmicut

at the eraplove's regular

HHH/de

(Letterhead of Bruce P. McDonald, M. D., [402 161] house M. rrz Kansas City 27, Mar) of ribon O all call G TIMAY 1860 and with the Company To Whom This May Concern Ren Mr. Benjamin Owens 941 Nebraska-Kansas City, Ks. National Brotherhood of Packinghouse Workers, : 12 raed This is to verify Mr. Owens was examined and treated by me this date and that he is released to resume his regular work as of May 23, 1960. Dear Mr. Kobett: Mr. Benjamin Owe sruov ylurt vreyat von told him that the union disadom If Broos PromoDonato hound in BPM/Imp . . esas on zi do Brace P. McDonald, M.D. a sid Mr Owens does not understand why, in the fact 1011 In Circuit Court of Jackson Courty, Missouringer PLAINTIFF'S EXHIBIT 4 Our File No. 18760 Eunis, Browne & Martin, January 5, 1961. Mr. Ernest F. Kobett, Vice President, ARB-M National Brotherhood of Packinghouse Workers, 1020 Court Street. fol. 2951 In Castur Court of Jackson Controcail Adasol 18 Dear Mr. Kobett: 3 THINKE STATEMENTS of the grave Please advise whether the union contemplates any further action on this matter of Benjamin Owens vs. Swift & Company. 1212 Ma Geo Street Bldg. Please refer to our letter of December 14, 1960, off 2131 Yours very truly noggiff & vir) anan'l ENNIS, BROWNE & MARTIN, edword R wall to your letter of November 25M18AA

regarding the Grievance Case of Benjamin Owens.

[fol. 294], A. M. blandGold, Trees, B. de Dendelph, D. a. a. a. IN CIRCUIT COURT OF JACKSON COUNTY MISSOURI

Planting Braining 5

The greater of either a mistate? Our File No. 18750

disence reduced by the promonts sun December 14, 1960, of

Yalf. To as Brow Telepier .

Mr. Ernest F. Kobett, Vice President, National Brotherhood of Packinghouse Workers, 1020 Court Street,
St. Joseph, Missouri, by me this date and that he

Dear Mr. Kobett:

Mr. Benjamin Owens informs us that you told him that the union was not planning to take any further steps in his matter. Kindly advise if such is the case.

Mr. Owens does not understand why, in the face of the strong medical statements he furnished, the company is not required to put him back to work.

Yours very truly,

ENNIS, BROWNE & MARTIN.

ARB-M Jobbien Allan B. Browne National Brotherhood of Packarbonse, W

.1020 Court Street.

Company.

[fol. 295]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIPP'S EXHIBIT 6 : Hedo M. TM. 1800

Please advise wheti 0801.85 redmevon modeles any further

Mr. Allan Browne, Attorney 1212 Mc Gee Street Bldg. 1212 Mc Gee Street admissell to rottel and of rater expelit. Kansas City 6, Missouri Land View Bank Y

Japuary 5, 1961.

Bunna, BROWNE & MARIE TAS

This is in answer to your letter of November 25, 1960, regarding the Grievance Case of Benjamin Owens.

The case is still open pending further physical examinations of Mr. Owens. After we have received these Medical reports we will have further discussions with the Company.

Sincerely yours,

Our File No. 18769

November 3, 1960.

/s/ ERNEST F. KOBETT Ernest F. Kobett, Vice Pres.

National Brotherhood of Packinghouse Workers in all

National Bisert 8 truo of 0204 kinghouse Workers,

Suite 21 intossi Midgeof, 18. Des Moines, 9, down

[fol. 296]

to our letter of

296] answO nime ned : 9A In Circuit Court of Jackson County, Missouri

PLAINTIFF'S EXHIBIT 7

Our File No. 18760

M. 1960, de redmeyoN work very badly, and respectfully

National Brotherhood of Packinghouse Workers, 1020 Court Street, 1979

St. Joseph, Missouri.

Example Beower S.

Re: Benjamin Owens vs. Swift & Company

Attention: Mr. Ernest F. Kobett, Vice President

ARB-M

Gentlemen:

Please advise the results of the fourth step of the grievance procedure held on November 16, 1960.

Yours very truly.

ENNIS, BROWNE & MARTIN.

By:

Allan R. Browne

ARB-M

[folice] Indigving restrict guidence nego slits at each ed? Lasib in Ciacur Court or Jackson County, Missoum and Jackson County, Missoum and Jackson County, Missour and Missour and

PLAINTIFF'S EXHIBIT 8

/s/ Engles F. Nobert Ernest F. Kobert, Vice Pres. National Brotherhood of Our File No. 18760 November 3, 1960.

Business Agent, and paides T National Brotherhood of Packinghouse Workers, Suite 213, Flynn Building, 12 Des Moines, 9, Iowa.

Re: Benjamin Owens

IN Crecuit Court or Jackson County, Missoure

(beg .15)

Dear Sir:

Please let us hear from you in response to our letter of October 24_1960.

Mr. Owens needs the work very badly, and respectfully requests that the matter be expedited.

Very truly yours, O O'O'

ENNIS, BROWNE & MARTIN,

Benjanin Quens vs. Swift & Company

and R. Browne

ARB-M

entlemen:

Thense advise the results of the fourth step of the grievance precedure held on November 16/1950.

Yours very truly,

Ennis, BROWNE & MARTIN,

Allan R. Browns

ARB-M

[fol. 298]

[fol. 299]

In CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 91

Oatst on sift and spend from the room Our File No. 18760

October 24, 1960.

Kansas City, Kansas.

Business Agent,

National Brotherhood of Packinghouse Workers, nebnequent Suite 213, Flynn Building,
Des Moines, Iowa. (9)

Re: Benjamin Owens-KUMC No. 56-1

Re: Benjamin Owens

Dear Sir:

Our client, Benjamin Owens, is attempting to be reinstated by Swift & Company, here in Kansas City, Missouri.

They refuse to continue his employment, stating that he was not physically qualified. However, they did restore him for two days, and then again refused to keep him, although he has medical statements from five doctors, indicating that he is qualified for the job physically. Swift & Company have stated that the matter is in the fourth step of the grievance procedure. Client would like for the meeting to be held here in this city, as soon as possible, and for our firm to cooperate with you in presentation of the matter.

Will you please advise us when and where the meeting will be?

Yours very truly,

ENNIS, BROWNE & MARKEN,

By: .

Allan R. Browne

ARB-M

Allan R. Browne

Copy to:

Local No. 12, Independent Packinghouse Workers, 500 Adams Street, Kansas City, Kansas. [fol. 299]

IN CIRCUIT COURT OF JACKBON COUNTY, MISSOURI

PLAINTIES'S EXHIBIT 10

Our File No. 18769

October 24, 1960.

Our File No. 18760

September 9, 1960.

Dec Moines, lowa. (9)

Independent Packing House Workers' Union, store temperate Local No. 12, Marsing beautiblian than vist Size of in S 500 Adams. Kansas City, Kansas.

Re: Benjamin Owens-KUMC No. 56-9635

Gentlemen:

Our client, Benjamin Owens, is attempting We represent Mr. Benjamin Owens, a member of your Local, who is trying to be reinstated with Swift & Company in his job. o war not physically qualified. Howthan Thir

We need a copy of your agreement with Swift & Company. Is there some way in which you could send us a copy of itt If you will do so, we will be glad to mail it back, if you so desire, after looking at it is bear and program of

With kind regards, I am. toolid nothbooth, conseque, out to to be held here in this city, as soon as po

A method out to not ambeen as no Very truly yours, of min two

Ho: Benjamia Owens

uniteem out eren's bus nells a Ennis, Browne & MARTIN. Fod Hen

Bv:

Allan R. Browne

ARBOM'S SERVER BENEFIT

Allsn R. Browne.

ARB+M

Copy to

Local No. 12, Independent Packinghouse Workers. 300 Adams Street,

Kansaa City, Kansas...

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLANTING'S EXHIBIT 11

(Letterhead of National Brotherhood of Packinghouse Workers, Des Moines 9, Iowa)

November 10, 1960

#18760

in the Lagarny tongs Mr. Allan R. Browne, Attorney

1212 McGee Street rugs noin U - noaround branged

Kansas City, Missouri beveirgg A - anew() ned

Dear Sir:

The grievance case of Benjamin Owens, will be heard in the 4th Step of the Grievance procedure in Kansas City. Missouri on November 16, 1960, paron sait stage at rabre at

I will be in Kansas City, Missouri on Tuesday, November 15 and providing there is no objection by the Local #20 officers I would be glad to meet and discuss the case with you before I meet with Swift & Company.

Sincerely yours.

The position of Dr. out a drow strong of m/s/ Enver F. Kober anow O used Ernest F. Kobett, Vice Pres. N. B. P. W. 1020 Court Street of a main St. Joseph, Missouri

H. P. Button-Foreman

B. Sharb-Div. Supt.

ce Miss Ann Leonard Smith Food off an monnage an arow In President Don Mahon a story of to tedrate a most sman

[fol. 300a] Clerk's Certificate to foregoing exhibits (omit-

sation would probably him company from hirler him. I be-lieve to is another to social security disability and I would

sign such a paper. This would then entitle him to god some

[fol. 301]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 17

KANSAS CITY-Aug. 19, 1960

ed F. Hanwine, Attorne

Second step meeting 10-22-105

Meeting held 8/18/60

Persons present-

Leonard Jamerson—Union representative Ben Owens—Aggrieved H. P. Button—Foreman B. Sharp—Div. Supt.

Company's Position-

"In order to make the company's position as clear as possible the medical evidence as shown in the Superintendent's Office was reviewed thoroughly. The position taken by Dr. Morris of K. U. Medical Center was presented which in our opinion left little doubt as to our position in refusing employment to Ben.

The position of Dr. Morris and our plant physician is that Ben Owens was not physically able to perform work in line with his seniority in the Beef Cutting.

Union's Position-

That Ben should be returned to work and be given light work assignment in the Beef Cutting. They presented statements from a number of doctors showing an improvement in blood pressure readings.

No settlement reached in this step.

B. Sharp

[folk302], rangaroo aliw betsisozana draw idgil [802 lot IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI STAT

116 dud trouer Perendant's Exhibit 18 tart vivos mis I.

(Letterhead of Hughes W. Day, M.D., F.C.C.P., 19woq Aliw bediat I a Kansas City 1, Kansas) v. even I dyeiled-

February 6, 1961

Mr. Leonard Jamerson Thank we for letting National Brotherhood of Packinghouse Workers and no glod Local 12 Samoy view view votes Kansas City, Kansas

W REHOU Dear Mr. Jamerson:

We examined Mr. Benjamin Owens today at the request of your union for an opinion of his ability to return to work. I will not include in this letter any of his lengthy history for I know you already have this in his file. Our examination was limited in order to keep the expenses low and no x-rays were taken because of this. For your information, they have been made at the University of Kansas School of Medicine. descing was hold August 31, 1966 These

Mr. Owens has hypertensive heart disease with a blood pressure today of 260/120 but the systolic pressure probably was higher as our office apparatus only registers up to 260 mm of mercury. Urine examination revealed no sugar but a one plus registration of albumin was determined. His non-protein nitrogen (a blood determination for kidney function) was recorded as 50 mgm %. This is above normal but not excessively so. He undoubtedly has a moderate degree of kidney damage seen in all of these types of patients. His electrocardiogram shows some slight damage but nothing extensive as one would expect to see.

As I discussed with you, we believe that Mr. Owens is not able to work and the legal problems of Workman's Compensation would prohibit any company from hiring him, I believe he is entitled to social security disability and I would sign such a paper. This would then entitle him to find some [fol. 303] light work massociated with company or corporate laws and insurance, workspal working a remain at

I am sorry that I cannot give you a better report but Mr. Owens is in a rather serious condition. It is not in our power or knowledge to estimate life and its duration but I believe I gave you this information when I talked with

Thank you for letting us see Mr. Owens and if we can help on his social security we will be glad to do so.

Very truly yours,

/8/ HUGHES W. DAY, M.D. Hughes W. Day, M.D.

[fol. 304]
IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 19

MEMORANDUM-THIRD STEP CASE #10-22-105

Meeting was held August 31, 1960. Those in attendance were: Mr. Owens has hyperbeneive heart diss

For the Umon M. Vaca Washer and Andrews of downdaire, while substance of Mooney administration with The best of the labour inches inners L. Jamerson of the pier

For the Company S. G. Strand

For reasons stated in other steps in this case, and upon medical reports, the Company's position was that B. Owens could not be rehired or returned to work because of his physical condition and no light work was available in line with seniority.

The Union contended that evidence from some of the doctors who examined B. Owens showed that he was released for regular work o he is the to social security disability and I would dean a layer. This would then entitle him to find the apa

[fol. 305]

305] Sees of Jackson County, Missouri

tes DEFENDANT'S EXHIBIT 20 at blott

SETTLEMENT AGREEMENT al bloll

Asympto Kansas City, Kansas ni blott 601 02 01

The Company and the Union agree to complete settlement on the following grievance cases on the following basis:

local vocational rehabilitation center.

CASE No.

10-22-57 Union agrees to withdraw.

10-22-87 Company agrees to reimburse C. Pearson, I. Marshall and A. Hill any Standards premium that may be due on the basis of applying temporary Standards adequate to cover their work as performed and as applied against hours considered to be on Standards for the period of time involved in this grievance, similar to the manner in which other Pork Dressing department employes' Standards were figured for same period of time.

10-22-104 Union agrees to withdraw.

The above settlements shall not constitute a precedent or be referred to in the handling of any other grievance or arbitration under any Master or Supplemental Agreement between the Company and the Union.

Executed at Kansas City, Kansas this 16th day of November, 1960.

NATIONAL BROTHERHOOD OF PACKINGHOUSE WORKERS

SWIFT & COMPANY

/8/ (Illegible)

/8/ LAWRENCE (Illegible)

ERNEST F. KOBETT

Disposition of Other Cases CASE No.

10-22-89 Hold in 4th Step at Union's request.

10-22-90 Hold in 4th Step at Union's request.

10-22-91 Hold in 4th Step at Union's request.

10-22-105 Hold in 4th Step at Union's request. However, Company and Union agree to promptly and jointly extend every effort possible to assist Benanimolic jamin Owens in getting relocated through and with the help of an appropriate federal, state or local vocational rehabilitation center.

10-22-115 Returned to 3rd Step per mutual agreement.

Company agrees to rain barks C. Pearson II Mark

[fol. 306] many sprahapter trade that the same times

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI socies know west as nor

be tobismos stront Dependant's Exhibit 21, hour for the period of this involved

FOURTH STEP CASE #10-22-105.

Heidmenic rengants and at a albeit according

FACTS AGREED TO BY UNION AND COMPANY

- 1. Ben Owens has continuous service from 7/12/46. He was born 7/14/12. show settlements shall not
- 2. Ben Owens has not worked since May 25, 1959; except for three days January 6, 7 and 8 (28 hours).
- 3. Ben Owens has been paid S&A from May 25, 1959 through December 18, 1959.
- 4. Ben Owens has not been paid S&A since December 18, 1959 in accordance with S&A policy/
- 5. Previous history of days lost due to illness:

1952 9 days 1953



1954 26 "—High Blood Pressure 1955 3 " 1956 72 "—Hurt Leg—& check Pressure—High— Leg Swelled up 1957 13 " 1958 0 " 1959 164 "

6. On June 16, 1960, Dr. Kirkpatrick of Kansas Medical Center reported findings as follows:

Blood pressure 226/90—sitting 212/110—standing 228/116—sitting 192/98—sitting (after 15 min.)

Working diagnosis: Hypertensive cardiovascular disease.

 Dr. H. J. Morris on 8/3/60 of Kansas Medical Center recommended only light work, in which he does not lift heavy objects (See copy attached).

FOR THE COMPANY:

/8/ B. E. (Illegible)

FOR THE UNION:

/8/ MANUAL VACA

[fol 307] ALLEGED FACTS PRESENTED BY UNION AND NOT AGREED TO BY MANAGEMENT

- Ben Owens was passed by Medical Department for work on January 6.
- 2. On August 31, Jamerson and Owens talked to Dr. Morris (University of Kansas Medical Center). Statement by Dr. Morris that he (Dr. J. H. Morris) did not know Ben Owens and had never seen him nor had he prescribed any medical direction, nor did he order the use of any medication to Ben Owens direct. Dr. Morris

- stated that temperatures 32 to 40 were O.K. but not extremes such as 90 to 95. Dr. Morris stated working with knife was O.K. Full test in letter attached.
- 3. Ben Owens was examined by reliable doctor and was told he could perform light work. (Copies attached)
- 4. The Union agrees that Ben Owens can perform light work.

[fol. 308] ALLEGED FACTS PRESENTED BY MAN-AGEMENT AND NOT AGREED TO BY UNION

- Our Medical Department has not approved his return on the strength of their diagnosis and reports on Owens' physical condition as reported by the University of Kansas Medical Center (See attached).
- Copy of Physical Demand Report signed by Dr. J. H. Morris (attached) limits activity and working in high humidity areas and marked with temperature extremes.
- 3. We do not have light work in line with physical limitations as listed in #2 above and in line with his seniority.
- 4. On January 6, 1960 Ben Owens came to the Medical Department and told the nurse he had been released for work by his doctor. The nurse not being familiar with this case stamped his card as O.K. to return to work. Ben reported to his department foreman and was assigned regular work in the Primal Beef Cutting. It came to the attention of the Swift medical examiner on January 8 that Ben had returned to work on January 6. The medical examiner advised the Superintendent's Office that Ben should not have been permitted to return to work due to his physical condition. Supervision advised Ben on Friday, January 8 that he should not have been permitted to return to work because of his physical condition. Ben was sent home.

[fol. 308a] Clerk's Certificate to foregoing exhibits (omitted in printing).

[fol. 309] there that has the root trade land expenses bedred IN THE KANSAS CITY COURT OF APPRAIS

APRIL Session, 1965

No. 24,174

the return being appropriate the course with the course and the course of the course o Benjamin Owens, Jr., Appellant,

id-over the state and the second to the second of the seco MANUEL VACA, CALEB MOONEY and ERNEST F. KOBETT, as OFFICERS OF THE LOCAL AND NATIONAL UNION, Respondents.

Appeal From Jackson County Circuit Court

OPINION—Filed April 5, 1965

Plaintiff, a discharged employee of Swift & Company, and member of the local and national union, brought a class action against defendants, officers of the local and national union, for actual and punitive damages arising from his alleged wrongful discharge as an employee of Swift, and the failure of the union and its representatives to process his protest through all of the administrative appellate procedures provided for by the Master Employment Agreement. Jury trial resulted in a verdict in plaintiff's favor for \$7,000 actual and \$3,300 punitive damages. The trial court set aside the verdict, entered judgment for defendants and stated as its reason therefor that jurisdiction over the subject matter had been pre-empted by the federal government. Plaintiff has appealed.

Benjamin Owens, Jr., the plaintiff, in January, 1960, when he was permanently and finally discharged, was 47 years of age and had been employed for approximately 16 years by Swift & Company. His duties included the moving of heavy halves and quarters of beef. Mr. Owens testified that

[File endorsement omitted] ovil betringer line hetelappetne), re

he had a congenital heart murmur and had great difficulty in keeping his blood pressure and weight within safe limits. [fol. 310] He said that in May, 1959, he began to "feel had", took some time off and visited Dr. Saper, the company physician; that he returned to work in September, 1959, the return being approved by Dr. C. W. Alexander, his family physician. Mr. Owens was a man 5 feet and 8 inches in height and when he quit work in May, 1959, weighed 230 pounds. Dr. Saper refused to authorize or approve his return to work, declaring that he was unable to perform labor because of his high blood pressure and cardiac condition. However, Dr. Bruce P. McDonald, a physician selected by plaintiff, reported his blood pressure as 160 over 96, and ex-

pressed the opinion that he could resume work.

Apparently Owens worked for some time after Septema ber, 1959, and for three days in January, 1960, when the employer (foreman) "fired him". This firing and all later refusals to re-employ plaintiff were solely on the ground that he was physically mnable to work. No other reason is suggested. Thereafter the union paid for an examination of plaintiff by a heart specialist of his own choice, Dr. Hughes W. Day. A letter or report by Dr. Day, dated February 6, 1961, was received in evidence. This report recited that plaintiff's blood pressure was 260 over 120, and was probably higher as 260 was the top register for the apparatus used. Dr. Day expressed the definite opinion that Owens was physically unable to return to work. The report described the patient's condition as serious, but refused to estimate his probable life duration. We were informed that plaintiff died prior to the appellate court argument.

Plaintiff never worked for Swift & Company after January, 1960. He had periods of employment elsewhere, but not regularly. Among others, he worked for Shostak Iron & Metal Co. Inc., Jewish Community Center and Spencer

Chemical Company.

[fol. 311] Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers in force at the time, entitled "Handling of Grievances" provided for, contemplated and permitted five administrative appellate steps described as "grievance procedures". Plaintiff protested his being denied employment, asserted he was physically able to work and enlisted the help of the union in contesting the issue. The five administrative steps may be briefly described as follows:

First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department.

Second step: May present the grievance to the Division Superintendent.

Third step: It may be presented to a grievance committee composed of three union and three company representatives.

Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present.

Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement.

It is conceded that plaintiff and the union processed plaintiff's grievance, without success, through the first four steps, but not the fifth step. Plaintiff says the defendants arbitrarily refused and failed to appeal his matter through the fifth step and caused him to lose wages, seniority, and to incur other damages. He charges, too, that one defendant proposed that plaintiff pay him \$300 as expense money preliminary to undertaking the fifth step.

Counsel for plaintiff presented a letter, responsive to his inquiry, from an attorney for the National Labor Relations Board. We quote from it:

[fol. 312] "The fact that an employee has been terminated from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment."

"In addition, if it can be shown that a labor organization caused, or attempted to cause, an employer to

discriminate against an employee in violation of Section 8(a) (3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation. " ". (Italics ours.)

As heretofore stated, the jury returned a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. In response to defendants' after-trial motion, the court set aside the verdict and entered judgment for the defendants for the following stated reason:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been preempted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri".

On appeal plaintiff's only assignment of error is the action of the trial court in setting aside the verdict and entering judgment for defendants. On appeal defendants assert, primarily, that the court was right in entering judgment for defendants and for the assigned reason. Defendants assert, secondarily, that such result was proper [fol. 313] for two additional reasons: First, under the evidence plaintiff "failed to show that defendant union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim". Second, plaintiff filed this suit before the fourth step had been completed and therefore brought it before exhausting his administrative remedies, hence the suit must fail.

cotion caused, or attempted to cause, an employer to

We believe the opinion in Lester Webster et al. v. Midland Electric Coal Corporation et al. (Ill., Oct. 1963) 193 N.E.2d 212, rules the vital issue involved in our case. Its stature is enhanced by the fact that certiorari was denied (June 8, 1964, 84 S.Ct. 1645) by the Supreme Court of the

United States. We shall discuss that opinion.

In the Webster case the suit was by 12 employees of Midland Electric. The petition alleged that the company discharged them in violation of the National Bituminous Coal Wage Agreement. Plaintiffs further asserted that the Union defendants refused to take the necessary steps to redress their grievances and asked that they be required to take such steps and respond in damages, both actual and punitive. This complaint was dismissed and plaintiffs then filed a class action for declaratory judgment. Again the company was charged with violating the National Agreement and the defendant Union with failure to process their grievances, which failure the complaint alleged was done willfully, wantonly, maliciously and arbitrarily. Again the prayer was for both actual and punitive damages. The circuit court dismissed the action and the plaintiffs appealed. The appellate court affirmed the orders and judgment of the trial court and said, l. c. 217, 218:

"Plaintiffs' only complaint against the union defendants is that they have refused to process their complaints against Midland. This the union may ordinarily do. (Ostrofsky v. United Steelworkers of America, [fol. 314] D.C., 171 F.Supp. 782). Considering the vast number of members of this union, wide discretion must necessarily be placed in the union agents so that as a whole the membership may be best served. (Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681).

"In addition, with reference to the union defendants, very recent expressions of the Supreme Court of the United States hold that the National Labor Relations Board's jurisdiction in matters involving individual members employment, presempts court jurisdiction. (Local 100 of United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U.S. 701, 83 S.Ct. 1429).

"In the Borden and Perko cases the Supreme Court points out their distinction from the case of International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923. The court said that the Gonzales case applies to strictly internal affairs of a union not in-

volving employment."

The Gonzales case is one of those relied upon by appellants in our case.

In Local 100 of the United Association of Journeymen and Apprentices v. H. N. Borden, 373 U.S. 690, 83 S.Ct. 1423, the action was by a union member against the local and parent unions for wrongful refusal of referral of the member on a construction job. The United States Supreme Court, with Douglas and Clark dissenting, held that the local union's conduct in refusing to refer a union member to a particular job was arguably subject to jurisdiction of the National Labor Relations Board, and the state court. did not have jurisdiction of the suit by the union member against the local and international unions for damages. [fol. 315] In Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko 373 U.S. 701, 83 S.Ct. 1429, a union member brought suit in an Ohio state court against the local union and certain of its officers for damages under the state common law because of defendant's causing the member to be discharged, and preventing his subsequent employment as foreman and superintendent. Judgment for the member was affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari the Supreme Court of

the Unifed States, Mr. Justice Harlan, held that it was at least arguable that the union member was an "employee" within the National Labor Relations Act and that the National Labor Relations Board might well find that the act charged in the complaint was an unfair labor practice by the Union and hence that there was sufficient probability of cognizability by the Board to require the relinquishment of the state's jurisdiction. The judgment for the union member was reversed outright. Again Justices Douglas and Clark dissented.

In the Gonzales case, 78 S.Ct. 923, 925, 926 (1957) Mr. Justice Frankfurter, speaking for the Supreme Court, affirmed the state court judgment for a union member suing for a wrongful expulsion from the union. The court said:

"But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied".

Chief Justice Warren and Mr. Justice Clark dissented, and in their dissenting opinion said:

"By sustaining a state-court damage award against a labor organization for conduct that was subject to an unfair labor practice proceeding under the Federal [fol. 316] Act, this Court sanctions a duplication and conflict of remedies to which I cannot assent".

This court, and the writer of this opinion, in United Brick & Tile Division of American-Marietta Co. v. Wilkinson, et al., 325 S. W. 2d 50, 54, 55, reluctantly concluded there was pre-emption in that case and said:

"In the Weber case (75 S.Ct. at page 488) Mr. Justice Frankfurter made this statement: " • the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.

Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters (etc.) Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much"."

That the question—"Has the Federal Government preempted?" under various sets of facts, presents knotty questions and has produced vague answers and different conclusions is further evidenced by the dissents of the two

justices in the Borden and Perko cases, supra.

We have read the cases cited by appellant and while many of them bear on the issue and some might seem to guide us to a different conclusion; we cannot allow the reasoning in those cases to prevail over the very recent and quite pertinent pronouncements by the Supreme Court of the United States. We believe that the conclusions expressed by the Supreme Court in the Borden and Perko cases and that court's refusal to grant certiorari in the Illinois case (Webster v. Midland, supra), are decisive on the matter before us. In our opinion those are the last and clearest (even though not unanimous) expressions of our [fol. 317] highest court. We therefore hold that the trial court correctly ruled that jurisdiction over the subject matter of this action has been pre-empted by the United States.

The judgment is affirmed.

Fred H. Maughmer, C.

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Sperry, C., concurs.

PER CURIAM :

The foregoing opinion of Maughmer, C., is adopted as the opinion of the Court.

Cross, P. J., concurs. Hunter, J., concurs. Howard, J., dissents.

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[fol. 318]

DISSENTING OPINION—Filed April 5, 1965

I am unable to agree with the result reached in the majority opinion. Assuming the Union officials acted in bad faith, in failing to carry plaintiff's grievance to the fifth step of the grievance procedure, i.e. arbitration, I can not imagine an argument which would show that these facts constituted discrimination by the employer or an unfair labor practice by the Union. Therefore, I can not conclude that the actions herein complained of are either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act (29 U.S.C. Section 157, 158), This view is bolstered by the decisions in the cases of Humphrey v. Moore, 375 U.S. 355, 84 Sup. Ct. 363, Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 Sup. Ct. 401, Bailer v. Local 470, International Teamsters, Chauffeurs, Warehousemen and Helpers, 400 Pa. 188, 161 A. 2d 343, and United Steelworkers of America v. Westinghouse Electrie Corporation, 413 Pa. 358, 196 A. 2d 857.

[fol. 319] While this matter of federal preemption in the field of labor relations remains cloudy, I do not believe that a state court should deny its own jurisdiction where it is unable to point out a logical argument showing that the fact situation is "arguably" within the jurisdiction of the National Labor Relations Board as constituting activity which is protected or prohibited by Sections 7 and 8 of the Act.

For these reasons, I would assert jurisdiction in the state court and reverse the judgment below.

von bes compared over Fred L. Howard, Judge

[File endorsement omitted] [1 and bexisted]

Mary Louise Thomas, Gerk.

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IN THE KANSAS CITY COURT OF APPRAIS

DECEMBER SESSION 1964 ni heten lebe din , totte No. 24174

BENJAMIN OWENS, JR., Appellant,

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MANUEL VACA, et al., Respondents.

ORDER OF SUBSTITUTION

Now at this day the Court having considered and fully understood Administrator's Motion for Substitution as appellant, doth consider and adjudge that said motion be and the same is hereby sustained and that N. L. Sipes. Administrator, be and he is hereby substituted as appellant in lieu of Benjamin Owens, Jr., deceased.

State of Missouri, Sct.

I, Mary Louise Thomas, Clerk of the Kansas City Court of Appeals, do hereby certify that the above is a full, true and complete copy of the Order of Substitution of N. L. Sipes as Administrator of the Estate of Benjamin Owens, Jr., deceased, Appellant v. Manuel Vaca, et al., Respondents as the same appears of record in my office as of January 18, 1965.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City. Missouri, this 24th day of June, 1966.

Mary Louise Thomas, Clerk.

(Seal)

Runfort J. concerts Howard. J., dissents

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[fol. 321]

In the Kansas City Court of Appeals
June Session, 1965

Jackson

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NILES SIPES, Administrator of Estate of Benjamin Owens, Deceased, Appellant,

VB.

MANUEL VACA, et al., Respondents.

LETTER OPINION—June 7, 1965

Now at this day the Court having considered and fully understood Appellant's motion for rehearing or in the alternative to transfer to the Supreme Court herein, doth consider and adjudge that the said motion for rehearing be and the same is hereby overruled and transfer to the Supreme Court denied.

The Court of its own motion and in view of the dissenting Opinion filed, this cause is ordered transferred to the Supreme Court for examination of the law because of the general interest and importance of the question involved.

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[fol. 322]

IN SUPREMÉ COURT OF MISSOURI

51554

N. L. Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased, Appellant,

Notes Store, Administrated of Estate of

MANUEL VACA et al., Respondents.

Appeal from the Circuit Court of Jackson County

JUDGME. —Entered December 13, 1965

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of Jackson County for further proceedings to be had therein, in conformity with the opinion of this court delivered; and that the said appellant recover against the said respondents costs and charges herein expended, and have execution therefor. (Opinion filed.) Transcript-\$213.75; Docket Fee-\$10.00; Total Costs-\$223.75

Mary Lorse Torseaviller

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Alexander and Amine

[fol. 323] IN THE SUPREME COURT OF MISSOURI

En Bano

of The Rangas Off SEPTEMBER SESSION, 1965

No. 51.554

NILES SIPES, Administrator of Estate of Benjamin Owens, Jr., Deceased, Appellant,

MANUEL VACA, et al., Respondents.

Appeal from the Circuit Court of Jackson County The Honorable J. Donald Murphy, Judge

Opinion—Filed December 13, 1965

.This action was instituted by Benjamin Owens, Jr., a discharged employee of Swift & Company and a member of the union, as a class action against the membership of the national and local union of the National Brotherhood. of Packing House Workers. Certain officers of said unions were individually named as defendants representative of the class. Owens sought to recover actual and punitive damages resulting from his alleged wrongful discharge and the failure of the union to process his protest through all of the administrative appellate procedures provided for in the Master Agreement. The trial resulted in a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. Upon motion of defendants the trial court set aside the judgment and entered judgment for defendants for the reason that jurisdiction of the subject matter had been preempted by the federal government. Plaintiff ap-

[File endorsement omitted]

pealed to the Kansas City Court of Appeals. He died while the appeal was pending and his administrator was substi-

tuted as appellant.

The Kansas City Court of Appeals adopted an opinion affirming the judgment but one of the judges dissented and the court of its own motion transferred the case here. In [fol. 324] that situation we will decide the case "the same as on original appeal." Article V, § 10, Constitution of

Missouri 1945, V.A.M.S.

We will continue, for convenience, to hereinafter refer to Benjamin Owens, Jr., as plaintiff. Plaintiff testified that in January 1960, when he was finally discharged by Swift & Company, he was forty-seven years old and had worked sixteen years for Swift; that part of his work was trimming loins, but he also handled heavy halves and quarters of beef; that he had a congenital heart murmur, was troubled with high blood pressure, and had become overweight; that all of his family had had these complaints and had. worked hard and lived to a ripe old age; that in May 1959, he had been working long hours, felt bad, and decided to take sick leave for a time and rest up; that at that time he weighed 230 pounds and upon the advice of his physician began to lose weight; that in August his physician, Dr. Alexander, gave him a statement to the effect that he could go back to work and he attempted to do so. However, Dr. Saper, the company's physician, refused to authorize his return to work because of his blood pressure and cardiac condition. In January 1960, plaintiff was examined by Dr. Steinzeig who gave him a statement that he was able to go back to work. He presented this to the company nurse and she authorized his return to work and he worked three days. On the third day, the superintendent apparently learned that plaintiff was back at work and immediately discharged him on the ground that he was not able to work. Plaintiff testified that at that time he felt fine, had reduced his weight to 180 pounds, and was doing the work assigned to him. Plaintiff further testified that during the period from May 1959 to trial time (June, 1964) he had worked

on various temporary jobs but could not get regular employment because he did not dare give Swift, his previous employer, as a reference; that he did hard physical labor for Spencer Chemical Company, Shostak Iron and Metal Company, Guy Campbell, a contractor, Jewish Community [fol. 325] Center, and also did such work as cutting grass, trimming trees and things of that nature; that he was able to earn about \$1,000 a year at that type of seasonal employment.

After being discharged, plaintiff protested his being denied employment, asserted he was physically able to work, and sought the help of the union in contesting the issue and presenting his grievance. Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers provided for five administrative appellate steps for handling grievance procedures. The five administrative steps may be briefly described as follows: First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department. Second step: May present the grievance to the division superintendent. Third step: It may be presented to a grievance committee composed of three union and three company representatives. Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present. Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement. It is conceded that the union processed plaintiff's grievance, without success, throughout the first four steps. Plaintiff cooperated by furnishing the union the statements of a number of physicians indicating that he was able to resume work. Dr. H. H. Hesser, on March 24, 1960, certified that he had taken plaintiff's blood pressure and

that the reading was — Dr. Bruce P. McDonald on May

^{18, 1960,} signed the following certificate: "This is to verify

Mr. Owens was examined and treated by me this date and that he is released to resume his regular work as of May 23, 1960." On July 6, 1960, Dr. John M. Gill signed a statement to the effect that he had taken plaintiff's blood

pressure that day and the reading was —. On July 8,

1960, Dr. C. W. Alexander signed the following statement: "This is to certify that Benjamin Owens has been examined

[fol. 326] by me. His blood pressure is —. It is my

opinion he is physically able to perform regular work." The company in denying plaintiff's reinstatement did not question the qualifications or integrity of any of plaintiff's physicians but contended that it should have a report indicating a more detailed examination. The company also claimed to have a report from Dr. Saper and Dr. Morris which indicated that plaintiff was not physically able to resume his employment. After the close of the hearing on the fourth step, the union and the company agreed that the grievance be held open at that stage pending further developments and the possible obtention of additional evidence. The union representatives suggested that he have a complete examination by a doctor of his choice and the union would pay for the examination. Plaintiff went to Dr. Hesser who sent him to Dr. H. W. Day and, after examining plaintiff, Dr. Day sent a report to the union hearnouse anima wit tank between at it Ja 260.

indicating that plaintiff's blood pressure was — and that

there was some kidney damage and slight heart damage. He expressed the opinion that plaintiff was not able to work. Plaintiff testified that he asked Manuel Vaca, president of the local to carry his grievance to the fifth step but that Vaca stated the union did not have the money to use for that purpose and that he would take it to the fifth step if

plaintiff would give him \$300, which, plaintiff stated, he

refused to do. There is evidence that the executive committee of the local union thereafter decided not to take plaintiff's grievance to the fifth step because there was not sufficient favorable medical evidence. At about that time plaintiff employed an attorney who wrote several letters to Ernest Kobett, vice-president of the National Brotherhood, making inquiry as to what future action was contemplated by the union concerning plaintiff's grievance and Kobett did not answer those letters. This suit was filed by plaintiff against representatives of the union on February 13, 1962.

Defendant's evidence consisted of the testimony of four [fol. 327] union officers and representatives. They testified as to the handling of plaintiff's grievance through the first four steps, without success, and as to their reason for refusing to take the fifth step. Manuel Vaca denied that he made any request of plaintiff for \$300, or any other amount, and said that it would have been outrageous for an officer of the union to make such a request. Mr. Kobett testified that he attended the fourth step meeting and that, on May 8, 1964, he attended another meeting at which plaintiff's case was called up for review and since there was no new evidence to present he withdrew the grievance. He also stated that the president and general counsel of the National Union had advised him to withdraw the grievance. He further testified that out of 967 grievances filed during the two-year period preceding August 1963, only one had gone to the fifth step. He admitted that he did not obtain plaintiff's consent to withdraw the grievance, nor did he notify plaintiff that such had been done. In regard to the practice of handling grievances for members, he stated that: • • • the employee who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case or we don't have a case. Then the union makes to the states, though Congress has refrained from telling

Plaintiff at trial time testified that he was feeling good and had been working whenever he could get work; that he had worked for Spencer Chemical Company until two weeks before trial, handling bags of fertilizer weighing 80 pounds for as much as twelve hours a day; that he had been laid off because of lack of work.

As we have indicated, the trial court sustained the defendants' motion for judgment for the reason that "under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that [fol. 328] the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri." Upon this appeal the sole contention briefed by appellant is that the trial court erred in setting aside the verdict and entering judgment for the defendants.

The question presented is not an easy one to decide. The difficulties encountered were recognized in the case of Weber v. Anheuser-Busch, 348 U.S. 468, 480-481, 75 S. Ct. 480, 99 L. ed. 546, wherein the court stated: "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters, C. & H. Local Union [346 U.S. 485, 74 S.Ct. 161, 98 L. ed. 228], supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling

us how much.' 346 U.S., at 488. This penumbral area canbe rendered progressively clear only by the course of litigation * * ." We have considered many cases cited in the briefs but have concluded that our decision must rest, primarily; upon a correct interpretation of four cases decided by the Supreme Court of the United States. The two cases supporting the view that the state court had jurisdiction are International Association of Machinists et al. v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L. ed. 2d 1018, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) [fol. 329] et al. v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L. ed. 2d 1030. Two cases which tend to support a contrary view are Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L. ed. 2d 638, and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, 10 L. ed. 2d 646.

In Gonzales, the plaintiff, claiming to have been wrongfully expelled from membership, brought suit against the union and obtained a judgment ordering reinstatement and awarding him damages for loss of wages as well as for physical and mental suffering. The Supreme Court held that § 158 of 29 U.S.C.A. did not exclude the exercise of jurisdiction by the state court. In so ruling the court stated that: " * * * the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. . The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here pre-William of highest reach a policy to point throughtest animally has

sented, deprive a party of available state remedies for all damages suffered." 356 U.S. 620, 621.

In Russell, the plaintiff, a nonunion employee, brought a common-law tort action in a state court against a labor union and recovered a judgment for compensatory and punitive damages for malicious interference with his occupation by mass picketing and threats of violence during a strike. Upon review by certiorari the Supreme Court held that Congress had not deprived the victim of tortious conduct of the type there involved of his right of action for all damages suffered. In its opinion the court said: "We. [fol. 330] conclude that an employee's right to recover, in the state courts, all damages caused him by this kind of tortions conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. Of course, Russell could not collect duplicate compensation for lost pay from the state courts and the Board.

"Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. Penney v. Warren, 217 Ala. 120, 115 So. 16. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. Republic Steel Corp. v. Labor Board, 311 U.S. 7, 10-12. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board * * " 356 U.S. 646.

In Borden, as stated in the syllabus, "Respondent, a member of a local plumbers' union in Shreveport, La., arrived in Dallas, Tex., looking for a job with a construction company on a particular bank construction project there. Although the foreman of the construction company wanted him, he was unable to get the job, because the company's hiring was done through union referral, and the business agent of petitioner, the local plumbers' union in Dallas, refused to refer respondent. Respondent sued petitioner in a Texas State Court, seeking damages for such refusal and alleging that petitioner's actions constituted a willful.

malicious and discriminatory interference with his right to contract and to pursue a lawful occupation; that petitioner had breached a promise, implicit in the union membership arrangement, not to discriminate unfairly or to deny any member the right to work; and that it had violated certain state statutes. Petitioner challenged the State Court's jurisdiction." 373 U.S. 690, 691. The court held that the conduct of the union was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and hence the state court was precluded from exercising juris-[fol. 331] diction. The court said the case was to be distinguished from Gonzales in that Gonzales " * turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied. . . . The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages." 373 U.S. 697.

The Perko case involved a plaintiff who was a member of the union. He sued the union and certain of its officers to recover damages resulting from the acts of defendants in demanding that he be discharged from his duties as a superintendent or foreman. He was discharged and alleged that defendants prevented him from obtaining work as a foreman by representing that his foreman's rights had been suspended. Plaintiff obtained a substantial judgment in the state court and the Supreme Court granted certiorari. In holding that the state court had no jurisdiction the court stated that: "As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing

or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' Supra, p. 703. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." 373 U.S. 705.

A state court case supporting appellant's contention is Bailer v. Local 470, International Teamsters, etc., 400 Pa. [fol. 332] 188, 161 A. 2d 343, 346. Therein the following appears: "Appellant avers in his first claim that the appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act, since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment " "." On the other hand, a state court case tending to support the position of defendants is Webster v. Midland Electric Coal Corp., 43 Ill. App. 2d 359, 193 N.E. 2d 212[7].

Upon easual consideration it may appear that Borden and Perko conflict with Gonzales. However, it certainly must be said that those cases do not overrule Gonzales, by implication or otherwise, because both of them refer to and distinguish that case. We think it is clear that Borden and Perko are distinguishable, upon the facts, from the case before us. In Borden the union agent willfully refused to let Borden work even though the prospective employer requested that he be referred for a job. Perko lost his job as a foreman because of a dispute with the union as a result of which the union informed Perko's employer that the men would no longer take orders from him.

If, by subsequent opinions, the court has restricted Gonzales and Russell to the precise factual situations there involved (expulsion from the union and interference with employment by mass picketing and threats), then those cases would not apply in a determination of the case at bar. However, our reading of the various cases does not

convince us that such a restricted application of those cases is warranted.

We have concluded that the "Labor Management Relations Act," 29 U.S.C.A., §§ 157 and 158, has not pre-empted the jurisdiction of the Missouri courts in the case before us. While we think the facts in this case more strongly support state jurisdiction than the facts in Gonzales, we nevertheless are of the opinion that the Gonzales case is [fol. 333] decisive of the issue before us.

We do not think that it could reasonably be argued that the conduct of defendants constituted an unfair labor practice in violation of § 158, supra. Defendants contend that such was an unfair labor practice in that it violated § 158(b) and (b)(2) which read, in part, as follows: "It shall be an unfair labor practice for a labor organization or its agents - • • • (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . " Sections (a) and (a)(3) referred to in the foregoing provide that: "(a) It shall be an unfair labor practice for an employer-(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization "." It appears obvious to us that those provisions do not apply to the factual situation before us. Here the union had nothing to do with Owens being discharged. It is evident that that idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the "fifth step" and thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim.

Some of the cases have said that Gonzales involved an internal union matter not directly concerning a matter of employment. Such statements may be technically correct but as a practical matter the real complaint of Gonzales was his inability to obtain employment because of his expulsion from union membership. We see no difference in [fol. 334] that situation and the situation in the instant case. We are dealing with an internal union matter in that Owens complained of the refusal of the union to fully process his grievance. He, like Gonzales, hoped that as a result of proper union action he would be restored to his employment. If Gonzales involved a purely internal union matter then the case at bar involves a purely internal union matter. The Gonzales case is clearly applicable here and is ample authority for our conclusion that jurisdiction of the subject matter of this case has not been pre-empted by the Labor Management Belations Act, 29 U.S.C.A., \$\$ 141, et seq.

Defendants have briefed two alternative contentions which they say support the action of the trial court in entering judgment for them even though we should hold (as we have) that jurisdiction of the subject matter of this claim was not pre-empted by the Labor Management Relations Act, supra. The first of those contentions is: " . . . that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim." In considering that point we will view the evidence in the light most favorable to appellant. The essential issue submitted to the jury was whether the union, as plaintiff's agent: " * arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects . . . much and to themselves as an eight of the dainer

We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were [fol. 335] content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants.

The other alternative contention is that the judgment for defendants should be affirmed because " * * it was shown that the fourth step of the grievance was held open and not completed until almost the time of the trial of this cause of action and after the filing of the same and that, as a consequence thereof, the plaintiff has failed to exhaust his administrative and contractual remedies." That point is without merit. Defendants' evidence showed that they were in complete control of the management of plaintiff's grievance. One of the defendants failed to answer several letters he received from plaintiff's attorney inquiring as to what future action was contemplated concerning the grievance. Finally, without plaintiff's consent, the defendants withdrew it. If plaintiff failed to exhaust his administrative remedies it was entirely the fault of defendants. It is elementary that defendants will not be heard to interpose as a defense to this claim a condition which resulted solely from their action or inaction.

It will be noted that the amount of punitive damages specified in the verdict was \$3,300. Reference to the petition discloses that the prayer for punitive damages was in the amount of \$3,000. Before the judgment is re-entered, as hereinafter directed, plaintiff should be required to file a remittitur in the amount of \$300.

[fol. 336] The judgment is reversed and cause remanded with directions to reinstate the verdict and judgment for plaintiff.

Lawrence Holman, Judge.

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All concur.

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IN SUPRBME COURT OF MISSOURI

51554

N. L. Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased, Appellant,

VR.

MANUEL VACA et al., Respondents.

RESPONDENTS' MOTION FOR REHEARING OVERBULED
—January 10, 1966

Now at this day on consideration of respondents' motion for rehearing in the above-entitled cause, it is ordered by the Court that said motion be, and the same is, hereby overruled.

[fol. 338] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 339]

No. October Term, 1965

MANUEL VACA, CALEB MOONEY and ERNEST F. KOBETT, Petitioners,

V8.

Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—April 7, 1966

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extending to and including May 2, 1966.

Byron R. White, Associate Justice of the Supreme? Court of the United States.

Dated this 7th day of April, 1966.

220

[fol. 340]

OPREME COURT OF THE UNITED STATES

No. 1267, October Term, 1965

MANUEL VACA, et al., Petitioners,

Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

Samuel () were it

Dated this 7th day of April, 1966, hand

ORDER ALLOWING CERTIORARI-June 6, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted, and the case is placed on the summary calendar. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. LIBRARY IN

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JOHN F. DAVIS, CLEM

IN THE

Supreme Court of the United States

October Term, 1966

MANUEL VAGA, CALEB MOONEY, and ERNEST F. KOBETT,
Petitioners

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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TABLE OF CONTENTS

230.1	P. Control of the Con	عه
OPINIONS BELC	appropriate the state of the section	19
Pory Wat Street	and a Maissal Mariana Calba 100 7 Safet	10
JURISDICTION .	Assessment of the Assessment o	
IS TOWN YORK	under V. United States Lines, 246 V. Sapp. 502 (
QUESTIONS PRE	SENTED ALLEGE TO COURSE TO THE STREET	
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CONSTITUTION	AL AND STATUTORY	••
PROVISIONS	INVOLVED	
Oursell of the second		11. 15
STATEMENT	118 by the most escapined a gramm	01)
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22 (1966) 1 21	Numbell	3
The Details	extern the same can commend or as a supple by	4
加坡市市	RANTING THE WRIT	4年
REASONS FOR G	RANTING THE WRIT	11
CONGLETETON	warn't whencom Vi. kielandical a minis	
CONCLUSION	A. 10101	23
APPENDIX A	to due motel company success and in deep	100
A second		0
Consututional a	and Statutory Provisions Involved	25
APPRINTLY D	* (Capi) bec 2:0 its 3:0 2:0 (1962) *	41
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Order of Trial	Court S. A. L. C. Market L. Correspond property of the	*
APPENDIX O	hamping a Macc 215 U.S. 335 (1964) 5 cm.	疑.
Sant of the land	odersudent Metal Welders Union (Turbas	1
Opinion of Kan	eas City Court of Appeals	9
The security and	or and and Anna to Markinsky a County 250	
THE RESIDENCE OF THE PARTY OF T		METERS
Opinion of Miles	our Supreme Court WALL dealed bearing	8
(1258) (5681) 460	sternational Union, UAW v. Russell, 356 U.S.	1
APPENDIX P Agus	Look of Tenerippinal United, UNW, 221 F. C	2
.Excepts.from C	ollective Designating Agriculation	2

TABLE OF CITATIONS

C

Spa Cases Page
Amberton Knieting Mills, Inc., 143 N.L.R.B. 1195 (61968) 216 (11915
Berman w National Maritime Union, 166 F. Supp. 327 (S.D.N.Y. 1958)
Brandt v. United States Lines, 246 F. Supp. 982 (S.D.N.Y. 1964) 21
Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952)
Conley v. Gibson, 355 U.S. 41 (1957)
Cortes v. Ford Motor Co., 349 Mich. 108, 84 N.W.2d 525 (1957) 21
Cosmark v. Struthers Wells Corp., 412 Pa. 211, 194 A.2d 325 (1963), cert. denied, 376 U.S. 962 (1964)
Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963) 21
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 12, 16, 21
Preedman v. National Maritime Union, 347 F.2d 167 (2d Cir. 111965) TINV THI OWNTHAND NOT ENOUGH
Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949)
Green v. Los Angeles Stereotypers Union, 356 F.2d 473 (9th Cir. q. 1966) 10 hoviount anoisyout violutes bus landituitened 16 Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962)
Hiller v. Liquor Salesmen's Union, 338 F.2d 778 (2d Gin, 1964) . 16
Humphrey v. Moore, 375 U.S. 335 (1964) 11, 12, 16, 27
Independent Metal Workers Union (Hughes Tool Co.), 147 9 9 9 N.L.R.B. 1579 (1964) 2004 N.L. R.B. R.B. 1579 (1964) 2004 N.L. R.B. R.B. 1579 (1964) 2004 N.L. R.B. R.B. R.B. R.B. R.B. R.B. R.B. R
International Ast'n of Machinists v. Gonzales, 356 U.S. 617 (1958), 10
International Union, UAW v. O'Brien, 339 U.S. 454 (1950) 15 International Union, UAW v. Russell, 356 U.S. 654 (1958) 10
Knox v. International Union, UAW, 228 F. Supp. Todal (ED). 15

was the second s	S
Local 1867, International Longshoremen's Asch, 148 NT R.B. 897	AND LOCATION
(1964) Local 207, Iron Workers v. Perko, 373 U.S. 701 (1963)	
Local 100, United Association v. Borden, 373 U.S. 690 (1963) 1	
Local 12, United Rubber Workers, 150 N.L.R.B. No. 50, 57 L.R.R.M. 1535 (Dec. 16, 1964)	ではなった
Mendicki v. International Union, UAW, 61 L.R.R.M. 2142 (D. Kan., Dec. 23, 1965)	七月
Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied; 326 F.2d 172 (2d Cir. 1963)	0
Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), affirmed, 273 F.2d 614 (4th Cir. 1960), pert. denled, 363 U.S. 849 (1960)	9
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)	1
San Diego Building Trades Council v. Garmon, 359 U.S. 296 (1959)	Service Control of the Control of th
Smith v. Evening News, 371 U.S. 195 (1962) (1962) (1962)	
Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)	2
Stewart v. Day & Zimmerman, Inc., 294 F.2d 7 (5th Cir. 1961) 13, 21	L
Stout v. Hod Carriers, Dist. Council, 226 F. Supp. 673 (1964) 15	
Syres v. Oil Workers International Union, 350 U.S. 892 (1955), reversing 223 F.2d 789 (5th Cir. 1955)	
Trotter v. Amalgamated Asi'n of Street Ry. Employees, 309 1.2d 584 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963)	A SECTION OF THE PARTY OF
Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944).	- 01.00 mm
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 13	S. Sand
United Steelworkers v. Enterprise Wheel & Car Corp., 563 U.S. 598 (1960)	AND THE PARTY OF REAL PROPERTY.
Webster v. Midland Elec. Corp., 43 III. App.2d 359, 193 N.R.2d 212 (1963), cert. denied, 377-U.S. 964 (1964)	

IN THE

Supreme Court of the United States

October Term, 1968

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MANUEL VACA, CALEB MOONEY, and ERNEST F. KORETT,
Petitioners

Nues Sires, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

PETITION FOR A WRIT OF CERTIONARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Manuel Vaca, Galeb Mooney, and Ernest F. Kobett, petitioners, pray that a writ of certionari issue to review the judgment of the Supreme Court of the State of Missouri entered against them in the above entitled case on December 13, 1965.

OPINIONS BELOW

The Circuit Court of Jackson County issued no opinion. Its order (R. 282)¹ is reprinted in Appendix B to this petition. The opinion of the Kansas City Court of Appeals, which is unreported, is set forth in Appendix C to this petition. The opinion of the Supreme Court of Missouri en bane is reported at 397 S.W.2d 658. It is set forth in Appendix D to this petition.

THOTUTA JURISDICTION TO IT

The judgment of the Missouri Supreme Court was entered on December 13, 1965. A timely petition for re-

Record references are to the pagination of the proceed as certified by the Client of the Supreme Court of Missouri which has been their with the Client of this Court of Missouri which has been their with the Client of this Court of Missouri and A. Court

hearing was filed on December 28, 1965 and was denied on January 10, 1966. On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

When a union subject to the National Labor Relations Act processed an employee's grievance under a collective bargaining agreement but refused to take it to arbitration because it believed in good faith that it lacked merit:

1. Can the grievant's claim that the union violated its duty of fair representation be adjudicated and remedied in a suit for damages against the union, or does exclusive jurisdiction over such a claim lie with the National Labor Relations Board?

2. If the Board does not have exclusive jurisdiction, does federal law authorize the court or jury to award damages against the union in the absence of any evidence of bad faith or discriminatory motive and solely on the basis of testimony going to the merits of the grievance?

3. Is the proper relief, in such a suit, an award of damages based on the assumption that the grievance would have been sustained if taken to arbitration, or should the court be limited to entering an order requiring the grievance to be arbitrated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, Section 8, and Article VI of the Constitution of the United States; Sections 7, 8(b), 8(d), 9(a) and 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. 157, 158, 159 and 160; and Section 301(a) of the Labor-Management Relations Act, 1947,

19 U.S.C. & 185 The pertinent provisions thereof alected forth in full in Appendix A to this petition.

STATEMENT

the United Brancasian with cash of the Workers is the

Ben Owens was a strong man. He used to work long hours in a "cooler" in a Swift and Company packinghouse trimming and manhandling best carcasses. But he was also a sick man. He had a congenital heart condition and high blood pressure, for which he had been treated for many years.

In May 1959, Ben Owens just couldn't work any more. He took sick leave and went to the hospital. Several months later, his doctor certified that he was able to return to work. But the company doctor told him that he was still too sick to work and should go back to bed.

Ben Owens couldn't take the company doctor's advice. He filed a grievance under the collective bargaining agreement and, while it was pending, he got other jobs requiring beavy work. His union processed his grievance through four steps of the grievance procedure, but decided not to take it to arbitration when an independent heart specialist, after thoroughly examining Owens, concluded that he was too sick to work.

Ben Owens died in December, 1964, at 52. Before he died, however, he had brought this suit against his union in a Missouri court for failing to take his grievance to arbitration. And he had persuaded a jury that he was strong and healthy and should recover \$10,000 in damages. The trial court set aside the vertice on the ground that Owens disuld have taken his claim to the National Labor Relations Board. On the appeal of Owen's administrator, the Supreme Lourt of Missouri reinstated the verdict, thus raising basic questions as to the nature of a union's obligations united tederal law in administering the grievance and arbitration provisions of a collective bargaming agreement, and as to the people rem-

strended the time for filthe Actailes

The United Brotherhood of Packinghouse Workers is the collective bargaining representative of the production and maintenance workers employed by Swift and Company at several of the company's plants, including its packing house in Kansas City, Missouri. The local at Kansas City is Local 12. The present suit was filed in the Circuit Court of Jackson County, Missouri by Benjamin Owens, Jr. against the

petitioners as representative officers of the union.

The petition for damages, as amended, alleged that under the collective bargaining agreement the union was Owens' agent in matters dealing with his employment by Swift and Company, particularly in connection with the handling of grievances (R. 9). It further alleged that the company had violated the agreement by wrongfully suspending Owens on the false assertion that he was not physically fit to hold his job, and that in fact he was physically able to work. (R. 10). It alleged, finally, that Owens had requested the union to take his grievance to arbitration, and that the union arbitrarily, capriciously and without just or reasonable cause, had refused to do so. It prayed for actual damages in the sum of \$7,000 and punitive damages of \$3,000. (R. 12).

The defendants' answer raised the following defenses, among officers: (1) that jurisdiction over the subject matter of the action was exclusively with the National Labor

At the this sat was filed, Manual Vaca was President of Local 12, Galeb Moonty was Vice President of the local, and Emest F. Kobett was Vice President of the national union. The complaint drew no distinction between the local and the national union, and all three positioners were sted as representatives of the national union (R. 8). This to implaint also alleged (R. 12) that the union wrongfully had demonstrate also alleged (R. 12) that the union wrongfully had demonstrate approximately \$200 from the plaintiff before taking the case of arbitration and refused to arbitrate the grievance because of the blaintiff refusal to pay such \$300. This same, however, ultimately the past set of the case, the n. Se, p. 6, inject.

Relations Board, which pre-empted the jurisdiction of the courts (R. 13), (2) that the petition had failed to state a cause of action, and (3) that the defendants had not exercised had faith in refusing to process the grievance (R. 14).

The case came on for trial in June, 1964. The facts, as they developed at the trial, were substantially undisputed. Owens had worked for Swift and Company as a laborer and as a trimmer since 1946. His job involved the performance of heavy labor and the cutting of meat in a refrigerated room (R. 145-147). He was sometimes required to lift and carry (with a helper) sides of beef weighing as much as 900 pounds each (R. 30-31), and chucks weighing up to 75 pounds (R. 33).

Owens suffered from a emgenital heart condition and high blood pressure, and had been under treatment at the Kansas City University Medical Center off and on since 1956 (R. 93, 109). In May, 1959, Owens, in his own words, "was feeling awfully bad" (R. 120), was "exhausted," and "didn't see any sense in going on killing" himself (R. 123). He decided to leave work in order to rest up (R. 28). The collective bargaining agreement provided for sickness and accident benefits on certification by a physician of physical inability to work (Appendix E, p. 54-5) and the company physician, a Dr. Saper, gave Owens permission to take sick leave and draw those benefits (R. 77). His own doctor, a Dr. Alexander, then put him in the hospital, where he remained for a week (R. 79).

At the end of August 1959, Dr. Alexander gave Owens a certificate saying that he was physically able to return to his job (R. 30). But when Owens reported to the plant, Dr. Super took his blood pressure and refused to allow him to work. Indeed, Dr. Saper advised Owens to get back in bed as fast as he could and to stay there (R. 39, 126). Owens continued to draw sick leave until December 18, 1959. He then went to a Dr. Steisnig, who treated him for three weeks and then also gave him a certificate that he was

abld to work (R. 47). This time, however, Owens presented his certificate to a company nurse who, unaware of his history, sent him back to work. He worked three days. January 6, 7 and 8, 1960—until the medical department of the company discovered he had come back to work and rold his superintendent to send him home. (R. 48-52, Def. Ex. 21, p. 3).

Owens then, in early January, 1960, filed a grievance lunder the collective bargaining agreement. While the grievance was pending, Owens went to a number of doctors who gave him certificates either showing his blood pressure at the time of the examination or stating that he was able to work (R. 39, 83-88). Owens did not inform any of these doctors that he had a history of heart trouble (R. 263-64).

In the second step of the grievance procedure the union, relying on the certificates of Owens' various doctors, took the position that Owens was able to work, and that in the event he was not able to do his regular job he should be provided with light work. The company said that it had no light work and that, on the basis of its medical records, Owens' return to his regular job would be hazardous to his life. The union appealed the grievance to the third step and then to the fourth step. And Owens hired a lawyer. (R. 110) at notice and standard of the grievance of the discounter of the standard of the grievance of the third step and then to the fourth step. And Owens hired a lawyer.

In the fourth-step meeting, in which the national union participated, the company took the position that in the face of their own doctor's opinion and the report of Owens' treatment at Kansas City University Hospital going back to 1956, they could not reinstate Owens simply on the basis of carrificates that he was able to work or simple blood pressure readings, but would require the report of a complete

contact processing special five step grisewest procedures of company and maintenance of the processing for discussions at according level of company on contact on a posterior of the process of the proc

physical examination (R. 235). They then discussed rehabilitation. The company proposed to Owens, who was present, that he seek help from the beast association in Jehning a new trade involving lighter work (R. 108, 185, 219). The company also promised to help him qualify for social security (R. 190, 219). Owens asked time to think it over and, at the union's request, the grievance was simply field? at the fourth step (R. 28; Def. Ex. 20).

A few weeks later Owens decided that he was not interested in rehabilitation and refused to go to the heart association. (R. 117). He asked the union to take the case to arbitration. (R. 125). The Executive Board of the Local then met to consider the case and decided to send Owens to any doctor of his own choosing at union expense, to attempt to get some better medical evidence: (R. 191, 219). Owens went to Dr. Hesser—one of the doctors who had given him a certificate—to get, in his words, "a real examination." (R. 83). Dr. Hesser said that, as a surgeon, he was not able to conduct such an examination. He recommended a heart specialist, Dr. Day. (R. 103, 260).

On February 6, 1961, Dr. Day examined Owens and concluded that Owens was a very sick man indeed (R. 143). According to his written report, Owens' blood pressure was 260/120 or higher (this was the upper limit of the doctor's apparatus). His electrocardiogram showed some heart damage. He had moderate kidney damage. In sum, according to Dr. Day, "Owens is not able to work and the legal problems of Workmen's Compensation would prohibit any company from hiring him. I believe he is entitled to social security disability and I would sign such a paper." (Def. Ex. 18).

In light of this report, the local executive board decided

To qualify for disability benefits under social scourity, a person must be unable "to engage in any substantial gainful activity by season of any medically determinable physical or mental impairment which can be expected to result in death or to be of long continued and inflating duration." 42 U.S.C. § 423(c) (2).

not to appeal the case to arbitration but to keep it in a "hold" status (R. 194, 221) in the hope that something would develop that would justify a further attempt to get Owens back to work. (R. 252).

In February, 1962, Owens filed this suit. Two years later, on May 8, 1964, the grievance was withdrawn at a meeting with the company at which pending grievances were reviewed. (R. 253).

In addition to testimony as to the above sequence of events, which was substantially undisputed, Owens' attorney sought to show at the trial that Owens was in fact physically fit. He did this through testimony as to the heavy work. Owens had done, on a casual basis, since he left Swift, the baseball games Owens had played, and Owens' own statements as to his physical condition. Some of this testimony was objected to on the ground that the issue to be tried was not whether Owens was in fact physically fit but whether the union had acted in good faith on the basis of the information available to it. The objection was overruled (R. 135-136). The plaintiff did not, nevertheless, introduce any medical testimony as to Owens' physical condition. And the defendants, consistent with their view of the issue to be tried, of course introduced none.

The only other disputed issue related to the claim that defendant Manuel Vaca, the Local Union President, had asked Owens for \$300 to arbitrate the case. Owens testified that after the Executive Board had detided not to arbitrate, Vaca told him that if he could pay \$300 toward the dost of the arbitration the union might arbitrate. (R. 149-151). Owens also testified that he would not give it to Vaca, but because he trusted Jamerson, the representative who handled the grievance at the second and third stept, he offered it to Jamerson, but Jamerson refused to take it (R. 257). Vaca denied ever having asked for \$300, be any sum (R. 222). Jamerson, who supported Owens throughout and who had been in favor of arbitrating the case, testified that Owens had volunteesed to give him \$300 if the case was won but that he arised the offer (R. 182). The issue was not mentioned in the table scattle assumption of the questions to be decided by the jury (St. 200-20) and was not relied on by the Missouri Supreme Court in sustaining the jury's verdict.

The trial court denied defendants' motions for a directed verdict both at the close of plaintiff's testimony (R. 157) and at the close of the entire evidence (R. 265). In both motions the defendants argued, among other things, that there was no evidence that the union's refusal to carry the grievance to arbitration was discriminatory, malicious or in bad faith, and that the subject matter of the action was one within the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act.

The case was submitted to the jury. The court instructed the jury that if the company's claim that the plaintiff was not physically fit was false and its refusal to reinstate Owens was wrongful, and if the union "arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry" the grievance to arbitration, then the jury should find for the plaintiff. (R. 266-269). The jury was further instructed that if it found that the conduct of the defendant was "willful, wanton and malicious" it could award punitive damages against the union. (R. 269). On the other hand, the court instructed the jury that if it found that the union and its representatives acted "reasonably and in good faith," and not "maliciously, arbitrarily, wantonly or wrongly," it should find for the defendants. (R. 270, emphasis added).

The jury returned a verdict for Owens in the sum of \$10,300: \$7,000 for actual damages and \$3,300 for punitive damages. (R. 275). The defendants thereupon moved for judgment in accordance with their prior motion for a directed verdict, and in the alternative for a new trial. In addition to the grounds previously urged, the motion complained of the trial court's failure to instruct the jury as to what constituted a wrongful refusal by the union to take the case to arbitration, and the assumption implicit in the court's charge "that the result of an arbitration proceeding would have been the restoration of the job and amiority rights to plaintiff." (R. 278-79). The court austained the motion

on the ground that the conduct of the defendants was arguably protected under the National Labor Relations Act and that exclutive julipdiction over the subject matter lay with the National Labor Relations Board. (R. 282; Appendix Dihereto) a partite argument and apply forms in a secondary and a second

Owens appealed to the Kansas City Court of Appeals. (R. 282). Prior to argument, he died and his administrator was substituted as the appellant. The Court of Appeals on April 5, 1965, affirmed the judgment of the trial court, with one judge dissenting. (R. 287-297; Appendix C. hereto). On motion for rehearing or transfer to the Supreme Court of Missouri, the Court of Appeals transferred the case to that Court (R. 300).

On December 13, 1965, the Supreme Court of Missouri reversed the Court of Appeals. In its opinion, the court dealt primarily with the issue of federal pre-emption. After reviewing the facts it concluded that its decision must rest primarily upon a correct interpretation of Machinists v. Gonzales, 356 U.S. 617, UAW v. Russell, 356 U.S. 634, United Association v. Borden, 373 U.S. 690 and Iron Workers v. Perko, 373 U.S. 701. On the basis of these cases, it concluded that the National Labor Relations Act had not pre-empted the jurisdiction of the Missouri courts.

The court reasoned that the conduct of the defendants was not arguably an unfair labor practice, since there was no showing that the union had discriminated against Owens. The union had nothing to do with Owens being discharged, it said, there was no wittence that it desired that some other member of the union obtain the job from which he had been discharged, nor was there any evidence to indicate that the union's representatives took any action to prevent the no capployment of Owens or to expel or suspend him from union membership. The crisk of the plaintiff's claim was that he was transfully discharged by the employer, and that the union arrongfully refused to process his claim

to arbitration and thus prevented him from being rengred to his job. Since discrimination was neither alleged nor submitted to the jury as an element of the claim, the defendants' action was not arguably an unfair labor practice and the Missouri courts had jurisdiction.

The Supreme Court of Misseuri also dealt with the defendants' contention that there was no evidence that the union was guilty of bad faith or discriminatory motive in refusing to prosecute the case to arbitration. Viewing the evidence concerning Owens' physical condition in the light most favorable to appellant, the court said, there was sufficient evidence from which the jury reasonably could have found that the union, as the plaintiff's agent, had arbitrarily and without just cause or excuse refused to carry the grievance to arbitration.

On this basis the court ordered that the cause be remanded with directions to reinstate the verdict for the plaintiff, with only the modification that the award of punitive damages in the amount of \$3,300 be reduced to the \$3,000 prayed for in the complaint.

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sentation could only be enjoyed by the courts, there being

As this Court has itself explicitly recognized, there is con-

siderable conflict and confusion over the question of whether the duty imposed on labor unions by the National Labor Relations Act to represent employees fairly is enforceable by private lawsuits in the courts, or by the administrative processes of the National Labor Relations Board. This is a question of utmost importance which is squarely raised in this case, and which should be resolved by this Court.

[&]quot;Humphrey v. Moore, 375 U.S. 335, 345 (1961); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). See pp. 16-17; infra

The existence of a duty of fair representation, as a matter of federal law, has long been recognized. It was first enunciated in a series of cases arising under the Railway Labor Act, in which this Court held that by empowering unions to act as exclusive bargaining agents for employees, the statute also intended "to impose on the bargaining representative ... the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944). See also Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Conley v. Gibson, 355 U.S. 41 (1957). The same principle has been held applicable in cases arising under the National Labor Relations Act. See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Syres v. Oil Workers International Union, 350 U.S. 892 (1955), reversing 223 F.2d 739 (5th Cir. 1955); Humphrey v. Moore, 375 U.S. 335, 342 (1964). with he leshoos additions

Under the Railway Labor Act, the duty of fair representation could only be enforced by the courts, there being no administrative enforcement machinery under that statute. The National Labor Relations Act, however, provides for an administrative agency, the National Labor Relations Board, with exclusive jurisdiction to enforce certain of its provisions. See Sections 8 and 10, 29 U.S.G. §§ 158, 160. Since the cauty of fair representation is implicit rather than explicit in the statute, the question of whether that duty is enforceable by the Board or the courts is not answered on the face of the statute.

Until 1962, it had generally been assumed that the duty of fair representation under the National Labor Relations Act, as under the Railway Labor Act, was judicially enforceable. In a number of cases, actions alleging breach of the

duty were entertained in the courts without reference to the possibility that the NLRB might have jurisdiction over such matters. Sec, e.g., Trotter v. Amalgamated Asin of Street Ry, Employees, 309 F.2d 584 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962); Stewart v. Day & Zimmerman, Inc., 294 F.2d 7 (5th Cir. 1961); Ostrofsky v. United Steelworkers, 171 P. Supp. 782 (D. Md. 1959), affirmed, 278 F.2d 614 (4th Gir. 1960), cert. denied, 363 U.S. 849 (1960). Occasionally the issue was raised, but since the Board had never held that it had broad jurisdiction to remedy a violation of the duty of fair representation the courts tended to assume that the matter fell outside the Board's authority. E.g., Berman v. National Maritime Union, 166 F. Supp. 327 (S.D.N.Y. 1958). In Syres v. Oil Workers, 223 F.2d 739 (5th Cir. 1955), reversed 350 U.S. 892 (1955), the issue was raised but the majority held that there was no federal right to fair representation at all under the National Labor Relations Act, and therefore did not reach the pre-emption question. Judge Rives, in dissent, argued that there was such a right but that the Board could provide no remedy, 223 F.2d at 739.

In a series of cases decided since 1962, however, the Board has held that it does have jurisdiction to remedy violations of the duty of fair representation, and that such violations are "unfair labor practices" under Section 8(b) of the Act, 29 U.S.C. § 158(b). The first of these cases was Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied 326 F.2d 172 (2d Cir. 1963). In that case, the Board held that the right of employees to be fairly represented is one of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and that "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" is an unfair labor practice under Section 8(b) (1) (A) of the Act, 29 U.S.C. § 158(b)

(1) (A). The Board specifically relied on Steele and the other Railway Labor Act decisions of this Court.

In Independent Metal Workers Union (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964) the Board held that a union's failure to process an employee's grievance on grounds of race was an unfair labor practice under Sections 8(b) (1) (A), 8(b) (2) and 8(b) (3), 29 U.S.C. §§ 158(b) (1) (A), (2), (3). In that decision, the Board appeared to recognize that its holding would preclude court enforcement of the duty of fair representation:

When the Supreme Court enunciated the duty of fair representation in Steele and Tunstall, supra, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical to certain unfair labor practice provisions of the National Labor Relations Act are enforcible by the Federal courts not an administrative agency. After enactment of the Taft-Hartley Act. an administrative remedy [for breaches of the duty of fair representation] became available in our view. "147 N.L.R.B. at 1575.

The Board has applied its rule that breaches of the duty of fair representation constitute unfair labor practices in two

The Second Circuit reversed the Miranda decision, but there was no majority on the question of whether a violation of the duty of fair representation is an unfair labor practice. Judge Medina wrote an opinion holding that the Board's jurisdiction is limited to cases where this union or the employer: Asve committed some act the natural and foresceable consolidate of which is to be beneficial or detrimental to the union, and that other forms of unfair or discriminatory action by a union are remediable only in the courts. \$26 F.2d at 175-180. Judge Lumbard concurred in the result without reaching this question, and Judge Priendly discreted.

subsequent race discrimination cases. Local 1367, International Longshoremen's Asr'n, 148 N.L.R.B. 897 (1964); Local 12, United Rubber Workers, 150 N.L.R.B. No. 50, 57 L.R.R.M. 1535 (Dec. 16, 1964). And in Amberton Knitting Mills, Inc., 143 N.L.R.B. 1195, 1216-17 (1963), the Board held that a claim that the union went through a sham arbitration, with no sincere desire to win, would if proved constitute an unfair labor practice since it would also be a violation of the duty of fair representation.

It is, of course, well-established that neither state nor federal courts may adjudicate controversies which are subject to the jurisdiction of the National Labor Relations Board. Indeed, the mere possibility that conduct may be an unfair labor practice is sufficient to bar court jurisdiction: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). In light of the Board ... decisions cited above, it is plainly "arguable" that the alleged failure of the union in this case to perform its duty of fair representation in the handling of Ben Owens' grievance constituted an unfair labor practice. And it is equally clear that if the union's action in failing to take Owens' case to arbitration was not in fact in violation of the duty of fair representation it constituted protected activity under Section 7 of the Act immune to state restriction or penalty. Cf. International Union, UAW v. O'Bries, 339 U.S. 454 (1950).

For these reasons a substantial number of courts, both state and federal, have held in recent years that they are precluded from entertaining actions to remedy violations of the duty. Knox v. International Union, UAW, 223 F. Supp. 1009 (E.D. Mich. 1963), affirmed, 351 F.2d 72 (6th Cir. 1965); Staut v. Hod Carriers, Dist. Council, 226 F. Supp. 673 (1964); Mendicki v. International Union, UAW, 61

Like R. M. 2142 (D. Kan.; Dec. 23, 1965); Cosmark v. Strittlers Wells Corp., 412 Pa. 211, 194 A.2d 325 (1963) sert. denied, 376 U.S. 962 (1964); Webster v. Midland Elec. Corp., 43 III. App.2d 359, 193 N.E.2d 212 (1963), cert. denied, 377 U.S. 964 (1964); Young v. United Steelworkers, 216 A.2d 500 (Pa., Jan. 17, 1966). Other courts, however, have continued to entertain such suits without discussion of the question of whether the matter was subject to the jurisdiction of the Board. Green v. Los Angeles Stereotypers Union, 356 F.2d 473 (9th Cir. 1966); Hiller v. Liquor Salesmen's Union, 338 F.2d 778 (2d Cir. 1964); Freedman v. National Maritime Union, 347 F.2d 167 (2d Cir. 1965); Wheatley v. International Brotherhood of Teamsters, 15 Utah 2d 80, 377 P.2d 555 (1963).

Although the question has been presented, either directly or collaterally, in a number of cases in this Court, it has never been explicitly decided. It first arose in Ford Motor Coi v. Hufman, 345 U.S. 330 (1953), in the context of a suit to enjoin enforcement of an allegedly discriminatory agreement. The Court noted the question in a footnote, 345 U.S. at 332, in 4, but said that the agreement being challenged was so clearly within the union's statutory authority that the question need not be decided.

In Syrus v. Oil Workers, 350 U.S. 892 (1955), the Court of versed per curium, and without discussion of the pre-emption question, dismissal of a suit to enjoin enforcement of a collective bargaining agreement as racially discriminatory.

That Syres did not settle the pre-emption question was made clear after the Labor Board in Miranda, 140 N.L.R.B. 181 (1962), adopted for the first time the view that breach of the duty of fair representation constituted an unfair labor practice. In Humphrey v. Moore, 375 U.S. 335 (1964) suit was brought to set aside a grievance settlement. The suit there, however, was against both the union and the employer. The Court acknowledged that "there are differing views on whether a violation of the duty of fair representa-

tion is an unfair labor practice," but held that the question did not have to be decided because the action was one to enforce a collective bargaining agreement, and under Smith v. Evening News, 371 U.S. 195, such actions against an employer under Section 301 of the Act, 29 U.S.C. § 185, are not pre-empted even if the conduct constituting the alleged breach of the agreement might also constitute an unfair labor practice. Id. at 344. Mr. Justice Harlan in a separate opinion urged that the question was "a difficult and important one" which should be decided by the court. 375 U.S. at 360.

The question was again adverted to last Term in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). There the Court held that an employee could not sue an employer directly for an alleged breach of a collective bargaining agreement without first processing his claim through the contractual grievance procedure. In so doing, it noted that if the employee did file a grievance and "if the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the form of redress then available." 379 U.S. at 652.

In this case, unlike Moore, the plaintiff did not join the company and did not, therefore, bring his suit as one under § 301 to enforce his rights against it under the agreement. Indeed, he has brought a separate action against the company for breach of the collective bargaining agreement, which is being held in abeyance pending disposition of the present case. Owens v. Swift & Co., No. 631293, Circuit Court of Jackson County, Missouri. And here, unlike Maddox, he did ask the union to arbitrate the case and met with a refusal. The "difference as to the form of redress" which the Court noted in Maddox but did not decide is therefore squarely presented.

The importance of the question is obvious. As potential claim that a union has violated its duty of fair representation arises whenever a union settles a grievance in a manner

As matters now stand, the NLRB as well as some courts will exercise jurisdiction over claims of violations of the duty of fair representation, although one or the other plainly lacks jurisdiction. Employees who truly have been treated unfairly should not have to run the risk of losing their rights by selecting the wrong forum. Unions should not have to defend their actions before both the Board and the courts. And the already over-burdened dockets of the NLRB and the courts should not be further strained by duplicative proceedings, or repeated wasteful litigation over a jurisdictional question which must ultimately be resolved by this Court. The decisions, in both the federal and the state courts, are squarely in conflict. The issue should be resolved in this case.

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Aside from the jurisdictional issue discussed above, this case presents a fundamental substantive question as to the nature of a union's statutory duty of fair representation under federal law in the area of grievance handling. Assuming that there is court jurisdiction to entertain actions for breach of the duty of fair representation, by what standards should the court determine that a union violated that duty when it failed to process an employee's grievance to arbitration? Ifas in this case, the union's action was based on an honest determination that the grievance lacked merit, is the grievant entitled to judicial review of the merits of the grievance, or must be show that the union's action was based on some dishonest, discriminatory, or irrelevant considerations? \ That \ question is highlighted in this case by the simultaneous holding of the Supreme Court of Missouri (1) that it had jurisdiction precisely because there was no evidence of union hostility toward or discrimination against Owens and (2) that the evidence is to the ments of the grievance was sufficient to sustain a finding that the union's refusal to take the grievarise to arbitration was "arbitrary" and "wrongful."

The importance of this question cannot be overstited. In every industrial plant in which there is a collective bargaining agreement with a grievance and arbitration procedure, the union is required daily to review grievances and determine which it will process and which it will drop. In Owens' case, the union had to decide whether his physical condition warranted the company's decision that he was unable to work, or whether that decision should be challenged through arbitration. There is nothing unusual about this case—it is the kind of problem which comes up again and again in grievance handling. See, e.g., United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In . other cases, unions must decide whether an employee has the necessary skills to perform a particular job to which he is seeking a promotion, or whether an employee who has been discharged really did commit an offense warranting discharge.

The screening of grievances by the union is, of course, essential to the proper function of the grievance procedure. "The employer expects and demands that the Ution 'screen' grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers." Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 793, (D. Md. 1959), affirmed, 273 F.2d 614 (4th cir. 1960), cert. denied, 363 U.S. 849 (1960). If every grievance were to be taken to arbitration, the entire system of self-government through the grievance procedure would collapse. Grievance procedures typically provide several "steps" prior to arbitration for the precise purpose of facilitating settlement of grievances by the union and the company without involving an outside arbitrator. Where a grievance procedure works properly, only a very small percentage of all grievances filed actually are arbitrated—the others are either granted by the employer, dropped by the union, or compromised in some way.

Yet if the decision in this case is correct, every time a

union drops an employee's grievance the employee may sue the union for breach of the duty of fair representation, alleging that the union's action was "arbitrary" or "without just or reasonable reason or cause," and obtain a review not of the union's good faith or honesty of purpose, but of the merits of the grievance.

Throughout this litigation the union took the position that the merits of the grievance were not in issue, that the sole question was whether the union had acted in good faith without discrimination. The evidence was uncontradicted that it had done so and the Supreme Court of Missouri so held in denying the pre-emption claim. Yet, over the union's objection, the trial court permitted the plaintiff to try before the jury the question of his physical condition, and allowed the jury to decide, on the basis of that evidence exclusively, whether the union had acted "arbitrarily" and "without just cause or excuse" in refusing to process the grievance. And the Missouri Supreme Court sustained the jury's verdict on the ground that there was evidence indicating that the plaintiff was physically unable to perform his job, even though it acknowledged that "the union had nothing to do with Owens being discharged," "there is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged," and "discrimination was neither alleged nor submitted to the jury as an element of the claim." (R. 3123 Sord Somewaits will although manufactured

It is plain that a union violates its duty of fair representation when it refuses to handle a grievance because the grievant is a member of a racial or religious or political minority, or for some other irrelevant, discriminatory, or corrupt reason. But where there is no evidence of that sort—where, indeed, it is clear that the union's decision was made on the basis of an honest appraisal of the merits of a grievance most courts have held that the grievant has no cause of action. Thus, in Donnelly v. United Fruit Go., 40 N. J. 61, 190 A.2d 825, 843-44 (1963), the court stated: "The courts cannot concern themselves with the wisdom of the union's action ... [S]o long as the union in good faith exercised an impartial discretion in reaching its decision that there was good cause for the discharge, judicial intervention is impermissible." In Cortez v. Ford Motor Co., 349 Mich 108, 84 N.W.2d 523, 529 (1957) the court held that a union has "discretion over grievances and interpretations of contract terms ... subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action, or fraud." In Brandt v. United States Lines, 246 F. Supp. 982, 984 (S.D.N.Y. 1964), the court held that "where the Union refuses to prosecute an employee's claim in good faith and on the basis of a thorough investigation . . ., the employee has no cause for complaint ... " In Stewart v. Day & Zimmerman, Inc., 294 F. 2d 7, 11 (5th Cir. 1961), the court held that in the absence of collusion or fraud "union officials should be given a wide latitude in deciding intra-union disputes and . . . courts should be slow to intervene in them."

This Court has recognized that "a wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). And in Humphrey v. Moore, 375 U.S. 335 (1964), the Court reiterated the "good faith and honesty" test and found no violation of the duty of fair representation because "the union took its position honestly, in good faith and without hostility or arbitrary discrimination." 375 U.S. at 342, 350. The decision of the court below in the present case seems to be in square conflict with these decisions.

The present decision seems also to conflict in principle with this Court's decision in *United Steelworkers v. Enter-*prise Wheel & Car Corp., 363 U.S. 593 (1960), involving the scope of judicial review of arbitration awards under collective bargaining agreements. In holding that such awards

cannot be set aside so long as they are based on relevant considerations, the court stated:

"The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in United Steelworkers of America v. Warrior & Gulf Navigation Co..., the arbitrators under these collective bargaining agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

These same considerations seem equally applicable to the present problem. Certainly the federal policy favoring the settlement of grievances through the process of voluntary agreement between labor and management is as strong as the policy favoring grievance arbitration, and surely such settlements would be as effectively undermined if courts had the "final say on the merits" of settled grievances as the policy favoring arbitration would be undermined if courts had broad jurisdiction to review the merits of arbitrator's awards. Moreover, just as arbitrators are more qualified than courts to decide the merit of grievances, surely the parties themselves, who are familiar with the demands and practices of the industry, are in a better position than a court or jury to determine such questions as whether a particular employee is or is not physically able to perform a particular job. A secretary of the second of the second

If the decision in the present case is permitted to stand, more and more disappointed grievants will seek judicial review of their union's decision not to process their grievances.

Unions, in turn, will become more and more reluctant to withdraw even the most frivolous grievances to avoid the risks and expense of litigation. The effect on collective bargaining, and particularly grievance handling, will be devastating. We urge, therefore, that this Court take the opportunity which is offered by this case to reaffirm that in grievance matters, as in the negotiation of a collective bargaining agreement, unions are entitled as a matter of federal law to exercise wide discretion which is reviewable only where there, is, as the Supreme Court of Missouri said there was not in this case, evidence of fraud, collusion, bad faith, or invidious discrimination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1966.

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Constitutional and Statutory Provisions Involved

Article I, Section 8 of the Constitution provides, in pertinent part:

"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."

Article VI, Cl. 2, of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §157 (1958), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. §158 (1958), provides, in pertinent part:

"(b) It shall be an unfair labor practice for a labor

organization or its agents-

the exercise of the rights guaranteed in section

"Une Board is empowered, as hereignafter provided,

- "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);..."
- "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, . . ."

Section 9(a) of the National Labor Relations Act, 61 Stat. 143 (1935), as amended, 29 U.S.C. §159(a) (1958), provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further. That the bargaining representative has been given opportunity to be present at such adjustment."

Section 10(a) of the National Labor Relations Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. §160(a) (1958), provides:

"The Board is empowered, as hereinafter provided,

to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185, provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or wihout regard to the citizenship of the parties."

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

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Manuel Vaca, Caleb Mooney, AND ERNEST F. KOBETT,

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Thursday, August 6, 1964

muvides.

Now on this day defendants' action for judgment in accordance with their motion for a directed verdict filed at the close of all the evidence is by the Court sustained for the reason stated in paragraph 9 of said motion, to-wit:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act. 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri." marité bas been nuels conterra

Now on this day defendants' alternative motion for a new trist is by the Court overruled.

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IN THE KANSAS CITY COURT OF APPEALS APRIL SESSION, 1965.

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towever. Dr. Bruce P. Med Walds a physician selected by

MANUEL VACA, CALEB MOONEY AND ERNEST F. KOBETT, AS OFFICERS OF THE LOCAL AND NATIONAL UNION,

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Appeal from Jackson County Circuit Court

Plaintiff, a discharged employee of Swift & Company, and member of the local and national union, brought a class action against defendants, officers of the local and national union, for actual and punitive damages arising from his alleged wrongful discharge as an employee of Swift, and the failure of the union and its representatives to process his protest through all of the administrative appellate procedures provided for by the Master Employment Agreement. Jury trial resulted in a verdict in plaintiff's favor for \$7,000 actual and \$3,300 punitive damages. The trial court set aside the verdict, entered judgment for defendants and stated as its reason therefor that jurisdiction over the subject matter had been pre-empted by the federal government. Plaintiff has appealed.

Benjamin Owens, Jr., the plaintiff, in January, 1960, when he was permanently and finally discharged, was 47 years of age and had been employed for approximately 16 years by Swift & Company. His duties included the moving of heavy halves and quarters of beef. Mr. Owens testified that he had a congenital heart murnur and had great difficulty in keeping his blood pressure and weight within safe limits. He mid that in May, 1959, he began to "feel bad",

took some time off and visited Dr. Saper, the company physician; that he returned to work in September, 1959, the return being approved by Dr. C. W. Alexander, his family physician. Mr. Owens was a man 5 feet and 8 inches in height and when he quit work in May, 1959, weighed 230 pounds. Dr. Saper refused to authorize or approve his return to work, declaring that he was unable to perform labor because of his high blood pressure and cardiac condition. However, Dr. Bruce P. McDonald, a physician selected by plaintiff, reported his blood pressure as 160 over 96, and expressed the opinion that he could resume work.

Apparently Owens worked for some time after September, 1959, and for three days in January, 1960, when the employer (foreman) "fired him." This firing and all later refusals to re-employ plaintiff were solely on the ground that he was physically unable to work. No other reason is suggested. Thereafter the union paid for an examination of plaintiff by a heart specialist of his own choice, Dr. Hughes W. Day. A letter or report by Dr. Day, dated February 6, 1961, was received in evidence. This report recited that plaintiff's blood pressure was 260 over 120, and was probably higher as 260 was the top register for the apparatus used. Dr. Day expressed the definite opinion that Owens was physically unable to return to work. The report described the patient's condition as serious, but refused to estimate his probable life duration. We were informed that plaintiff died prior to . the appellate court argument.

Plaintiff never worked for Swift & Company after January, 1960. He had periods of employment elsewhere, but not regularly. Among others, he worked for Shostak Iron & Metal Co. Inc., Jewish Community Center and Spencer Chemical Company.

Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers in force at the time, entitled "Handling of Grievances" provided for, contemplated and permitted five ad-

ministrative appellate steps described as "grievance procedures". Plaintiff protested his being denied employment, asserted he was physically able to work and enlisted the help of the union in contesting the issue. The five administrative steps may be briefly described as follows:

First step: Aggrieved employee may present his grievvance "with or without the union representative" to the foreman of the department.

Second step: May present the grievance to the Division Superintendent.

Third step: It may be presented to a grievance committee composed of three union and three company representatives.

Fourth step: Reference may be made to the general superintendent of the company.

Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement.

It is conceded that plaintiff and the union processed plaintiff's grievance, without success, through the first four steps, but not the fifth step. Plaintiff says the defendants arbitrarily refused and failed to appeal his matter through the fifth step and caused him to lose wages, seniority, and to incur other damages. He charges, too, that one defendant proposed that plaintiff pay him \$300 as expense money preliminary to undertaking the fifth step.

Counsel for plaintiff presented a letter, responsive to his inquiry, from an attorney for the National Labor Relations Board. We quote from it:

from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment, ***,

"In addition, if it can be shown that a labor organi-

discriminate against an employee in violation of Section 8 (a) (3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation * * *". (Italics ours).

As heretofore stated, the jury returned a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. In response to defendants' after-trial motion, the court set aside the verdict and entered indement for the defendants for the following stated reason.

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri".

On appeal plaintiff's only assignment of error is the action of the trial court in setting aside the verdict and entering judgment for defendants. On appeal defendants assert, primarily, that the court was right in entering judgment for defendants and for the assigned reason. Defendants assert, secondarily, that such result was proper for two additional reasons: First, under the evidence plaintiff "failed to show that defendant union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim". Second, plaintiff filed this suit before the fourth step had been completed and therefore brought it before exhausting his administrative remedies, hence the suit must fail.

We believe the opinion in Lester Webster et al. v. Midland Electric Coal Corporation et al. (Ill., Oct. 1963) 193 N.E.2d 212, rules the vital issue involved in our case. Its stature is enhanced by the fact that certiorari was denied (June 8, 1964, 84 S.Ct. 1645) by the Supreme Court of the United States. We shall discuss that opinion.

In the Webster case the suit was by 12 employees of Midland Electric. The petition alleged that the company discharged them in violation of the National Bituminous Coal Wage Agreement. Plaintiffs further asserted that the Union defendants refused to take the necessary steps to redress their grievances and asked that they be required to ta' such steps and respond in damages, both actual and punitive. This complaint was dismissed and plaintiffs then filed a class action for declaratory judgment. Again the company was charged with violating the National Agreement and the defendant Union with failure to process their grievances, which failure the complaint alleged was done willfully, wantonly, maliciously and arbitrarily. Again the prayer was. for both actual and punitive damages. The circuit court dismissed the action and the plaintiffs appealed. The appellate court affirmed the orders and judgment of the trial court and said, l. c. 217, 218: kerky ika zebrowen

"Plaintiffs' only complaint against the union defendants is that they have refused to process their complaints against Midland. This the union may ordinarily do. (Ostrofsky v. United Steelworkers of America, D.C., 171 F.Supp. 782). Considering the vast number of members of this union, wide discretion must necessarily be placed in the union agents so that as a whole the membership may be best served. (Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681,)

very recent expressions of the Supreme Court of the

United States hold that the National Labor Relations
Board's jurisdiction in matters involving individual
members employment, pre-empts court jurisdiction.
(Local 100 of United Association of Journeymen and
Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423,
10 L.Ed. 2d 638 and Local No. 207, International Association of Bridge, Structural and Ornamental Iron
Workers Union v. Perko, 373 U.S. 701; 83 S.Ct. 1429).

"In the Borden and Perko cases the Supreme Court points out their distinction from the case of International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923. The court said that the Gonzales case applies to strictly internal affairs of a union not involving employment." The Gonzales case is one of those relied upon by appellants in our case.

In Local 100 of the United Association of Journeymen and Apprentices v. H. N. Borden, 373 J.S. 690, 83 S.Ct. 1423, the action was by a union member against the local and parent unions for wrongful refusal of referral of the member on a construction job. The United States Supreme Court, with Douglas and Clark dissenting, held that the local union's conduct in refusing to refer a union member to a particular job was arguably subject to jurisdiction of the National Labor Relations Board, and the state court did not have jurisdiction of the suit by the union member against the local and international unions for damages.

In Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, a union member brought suit in an Ohio state court against the local union and certain of its officers for damages under the state common law because of defendant's causing the member to be discharged, and preventing his subsequent employment as foreman and superintendent. Judgment for the member was affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari the Supreme Court of the United States, Mr.

Justice Harlan, held that it was at least arguable that the union member was an "employee" within the National Labor Relations Board might well find that the act charged in the complaint was an unfair labor practice by the Union and hence that there was sufficient probability of cognizability by the Board to require the relinquishment of the state's jurisdiction. The judgment for the union member was reversed outright. Again Justices Douglas and Clark dissented.

In the Gonzales case, 78 S.Ct. 923, 925, 926 (1957) Mr. Justice Frankfurter, speaking for the Supreme Court, affirmed the state court judgment for a union member suing for a wrongful expulsion from the union. The court said:

"But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied".

Chief Justice Warren and Mr. Justice Clark dissented, and in their dissenting opinion said:

"By sustaining a state-court damage award against a labor organization for conduct that was subject to an unfair labor practice proceeding under the Federal Act, this Court sanctions a duplication and conflict of remedies to which I cannot assent"...

This court, and the writer of this opinion, in United Brick & Tile Division of American-Marietta Co. v. Wilkinson, et al., 325 S.W. 2d 50, 54, 55, reluctantly concluded there was pre-emption in that case and said:

"In the Weber case (75 S.Ct. at page 488) Mr. Justice-Frankfurter made this statement: " the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed meter and bounds. Obvi-

ous conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters (etc.) Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act, "leaves much to the states, though Congress has refrained from telling us how much"."

That the question—"Has the Federal Government preempted?" under various sets of facts, presents knotty questions and has produced vague answers and different conclusions is further evidenced by the dissents of the two justices in the Borden and Perko cases, supra.

We have read the cases cited by appellant and while many of them bear on the issue and some might seem to guide us to a different conclusion, we cannot allow the reasoning in those cases to prevail over the very recent and quite pertinent pronouncements by the Supreme Court of the United States. We believe that the conclusions expressed by the Supreme Court in the Borden and Perko cases and that court's refusal to grant certiorari in the Illinois case (Webster v. Midland, supra), are decisive on the matter before us. In our opinion those are the last and clearest (even though not unanimous) expressions of our highest court. We therefore hold that the trial court correctly ruled that jurisdiction over the subject matter of this action has been pre-empted by the United States.

The judgment is affirmed.

FRED H. MAUGHMER, C.

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Sperry, C., concurs. PER CURIAM:

The foregoing opinion of Maughmer, C., is adopted as the opinion of the Court.

CROSS, P. J.; concurs.

HUNTER, J.; concurs.

Howard, J.; dissents.

DISSENTING OPINION

I am unable to agree with the result reached in the majority opinion. Assuming the Union officials acted in bad faith, in failing to carry plaintiff's grievance to the fifth step of the grievance procedure, i.e. arbitration, I can not imagine an argument which would show that these facts constituted discrimination by the employer or an unfair labor practice by the Union. Therefore, I can not conclude that the actions herein complained of are either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act (29 U.S.C. Section 157,158). This view is bolstered by the decisions in the cases of Humphrey v. Moore, 375 U.S. 355, 84 Sup. Ct. 363, Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 Sup. Ct. 401, Bailer v. Local 470, International Teamsters, Chauffeurs, Warehousemen and Helpers, 400 Pa. 188, 161 A. 2d 343, and United Steelworkers of America v. Westinghouse Electric Corporation, 413 Pa. 358, 196 A. 2d 857.

While this matter of federal preemption in the field of labor relations remains cloudy, I do not believe that a state court should deny its own jurisdiction where it is unable to point out a logical argument showing that the fact situation is "arguably" within the jurisdiction of the National Labor Relations Board as constituting activity which is protected or prohibited by Sections 7 and 8 of the Act.

For these reasons, I would assert jurisdiction in the state court and reverse the judgment below.

FRED L. HOWARD, Judge

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IN THE SUPREME COURT OF MISSOURI EN BANC SEPTEMBER SESSION, 1965

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NILES SIPES, ADMINISTRATOR OF ESTATE OF BENJAMIN OWENS, JR., DECEASED,

Appellant,

MANUEL VACA, ET. AL.,

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Respondents.

Appeal from the Circuit Court of Jackson County The Honorable J. Donald Murphy, Judge

This action was instituted by Benjamin Owens, Jr., a discharged employee of Swift & Company and a member of the union, as a class action against the membership of the national and local union of the National Brotherhood of Packing House Workers. Certain officers of said unions were individually named as defendants representative of the class. Owens sought to recover actual and punitive damages resulting from his alleged wrongful discharge and the failure of the union to process his protest through all of the administrative appellate procedures provided for in the Master Agreement: The trial resulted in a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. Upon motion of defendants the trial court set aside the judgment and entered judgment for defendants for the reason that jurisdiction of the subject matter had been prempted by the federal government. Plaintiff appealed to the Kansas City Court of Appeals. He died while the appeal was pending and his administrator was substituted as appellant:

The Kansas City Court of Appeals adopted an opinion affirming the judgment but one of the judges dissented and

the court of its own motion transferred the case here. In that situation we will decide the case "the same as on original appeal." Article V, § 10, Constitution of Missouri 1945, V.A.M.S.

We will continue, for convenience, to hereinafter refer to Benjamin Owens, Jr., as plaintiff. Plaintiff testified that in January 1960, when he was finally discharged by Swift & Company, he was forty-seven years old and had worked sixteen years for Swift; that part of his work was trimming loins, but he also handled heavy halves and quarters of beef; that he had a congenital heart murmur, was troubled with high blood pressure, and had become overweight; that all of his family had had these complaints and had worked hard and lived to a ripe old age; that in May 1959, he had been working long hours, felt bad, and decided to take sick leave for a time and rest up; that at that time he weighed 230 pounds and upon the advice of his physician began to lose weight; that in August his physician, Dr. Alexander, gave him a statement to the effect that he could go back to work and he attempted to do so. However, Dr. Saper, the company's physician, refused to authorize his return to work because of his blood pressure and cardiac condition. In January 1960, plaintiff was examined by Dr. Steinzeig who gave him a statement that he was able to go back to work. He presented this to the company nurse and she authorized his return to work and he worked three days. On the third day, the superintendent apparently learned that plaintiff was back at work and immediately discharged him on the ground that he was not able to work. Plaintiff testified that at that time he felt fine, had reduced his weight to 180 pounds, and was doing the work assigned to him. Plaintiff further testified that during the period from May 1959 to trial time (June, 1964) he had worked on various temporary jobs but could not get regular employment because he did not dare give Swift, his previous employer, as a reference; that he did hard physical labor for Spencer

Chemical Company, Shostak Iron and Metal Company, Guy Campbell, a contractor, Jewish Community Center, and also did such work as cutting grass, trimming trees and things of that nature; that he was able to earn about \$1,000 a year at that type of seasonal employment.

After being discharged, plaintiff protested his being denied employment, asserted he was physically able to work, and sought the help of the union in contesting the issue and presenting his grievance. Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers provided for five administrative appellate steps for handling grievance procedures. The five administrative steps may be griefly described as follows: First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department. Second step: May present the grievance to the division superintendent. Third step: It may be presented to a grievance committee composed of three union and three company representatives. Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present. Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement. It is conceded that the union processed plaintiff's grievance, without success, throughout the first four steps: Plaintiff cooperated by furnishing the union the statements of a number of physicians indicating that he was able to resume work. Dr. H. H. Hesser, on March 24, 1960, certified that he had taken plaintiff's blood pressure and that the reading was 160.

Dr. Bruce P. McDonald on May 18, 1960, signed the following pertificate: "This is to verify Mr. Owens was examined and treated by me this date and that he is released to resume his regular work as of May 23, 1960." On July 6, 1960, Dr. John M. Gill signed a statement to the effect that he

had taken plaintiff's blood pressure that day and the reading was 160. On July 8, 1960, Dr. C. W. Alexander signed the

following statement: "This is to certify that Benjamin Owens has been examined by me. His blood pressure is 160. It is my opinion he is physically able to perform regu-

lar work." The company in denying plaintiff's reinstatement did not question the qualifications or integrity of any of plaintiff's physicians but contended that it should have a report indicating a more detailed examination. The company also claimed to have a report from Dr. Saper and Dr. Morris which indicated that plaintiff was not physically able to resume his employment. After the close of the hearing on the fourth step, the union and the company agreed that the grievance be held open at that stage pending further developments and the possible obtention of additional evidence. The union representatives suggested that he have a complete examination by a doctor of his choice and the union would pay for the examination. Plaintiff went to Dr. Hesser who sent him to Dr. H. W. Day, after examining plaintiff, Dr. Day sent a report to the union indicating the plaintiff's blood pressure was 260 and that there was some

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kidney damage and slight heart damage. He expressed the opinion that plaintiff was not able to work.

Plaintiff testified that he asked Manuel Vaca; president of the local, to carry his grievance to the fifth step but that Vaca stated the union did no have the money to use for that purpose and that he would take it to the fifth step if plaintiff would give him \$300, which, plaintiff stated, he refused to do. There is evidence that the executive committee of the local union thereafter decided not to take plaintiff's grievance to the fifth step because there was not sufficient favorable medical evidence. At about that time plaintiff employed an attorney who wrote several letters to Ernest

Kobett, vice-president of the National Brotherhood, making inquiry as to what future action was contemplated by the union concerning plaintiff's grievance and Kobett did not answer those letters. This suit was filed by plaintiff against representatives of the union on February 13, 1962.

Defendant's evidence consisted of the testimony of four union officers and representatives. They testified as to the handling of plaintiff's grievance through the first four steps, without success, and as to their reason for refusing to take the fifth step. Manuel Vaca denied that he made any request of plaintiff for \$300, or any other amount, and said that it would have been outrageous for an officer of the union to make such a request. Mr. Kobett testified that he attended the fourth step meeting and that, on May 8, 1964, he attended another meeting at which plaintiff's case was called up for review and since there was no new evidence to present he withdrew the grievance. He also stated that the president and general counsel of the National Union had advised him to withdraw the grievance. He further testified that out of 967 grievances filed during the two-year period preceding August 1963, only one had gone to the fifth step. He admitted that he did not obtain plaintiff's consent to withdraw the grievance, nor did he notify plaintiff that such had been done. In regard to the practice of handling grievances for members, he stated that:. " * * the employee who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case. or we don't have a case. Then the union makes the dein prospered that by would take it to the first of the moisis

Plaintiff at trial time testified that he was feeling good and had been working whenever he could get work; that he had worked for Spencer Chemical Company until two weeks before trial, handling bags of fertilizer weighing 80 pounds for as much as twelve hours a day; that he had been laid off because of lack of work, or work wenter as bevolving

As we have indicated, the trial court sustained the defendants' motion for judgment for the reason that "under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri. Upon this appeal the sole contention briefed by appellant is that the trial court erred in setting aside the verdict and entering judgment for the defendants.

The question presented is not an easy one to decide. The difficulties encountered were recognized in the case of Weber v. Anheuser-Busch, 348 U.S. 468, 480-481, 75 S.Ct. 480, 99 L ed. 546, wherein the court stated: "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters. C. & H. Local Union [346 U.S. 485, 74 S.Ct. 161, 98 L ed. 228], supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U.S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation * * *." We have considered many cases cited in the briefs but have concluded that our decision must rest, primarily, upon a correct interpretation of four cases decided by the Supreme Court of the United States. The two cases supporting the view that the state court had jurisdiction are International Association of Machinists et al. v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L ed. 2d 1018, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) et al. v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L ed. 2d 1030. Two cases which tend to support a contrary view are Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L ed. 2d 638, and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, 10 L ed. 2d 646.

In Gonzales, the plaintiff, claiming to have been wrongfulled expelled from membership, brought suit against the union and obtained a judgment ordering reinstatement and awarding him damages for loss of wages as well as for physical and mental suffering. The Supreme Court held that § 158 of 29 U.S.C.A. did not exclude the exercise of jurisdiction by the state court. In so ruling the court stated that: "# * the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfain labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered." 356 U.S. 620, 621.

In Russell, the plaintiff, a nonunion employee, brought a

common-law tort action in a state court against a labor union and recovered a judgment for compensatory and punitive damages for malicious interference with his occupation by mass picketing and threats of violence during a strike. Upon review by certiorari the Supreme Court held that Congress had not deprived the victim of tortious conduct of the type there involved of his right of action for all damages suffered. In its opinion the court said: "We conclude that an employee's right to recover, in the state courts, all damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. Of course, Russell could not collect duplicate compensation for lost pay from the state courts and the Board.

"Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. Penney v. Warren, 217 Ala. 120, 115 So. 16. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. Republic Steel Corp. v. Labor Board, 311 U.S. 7, 10-12. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board ***." 356 U.S. 646.

In Borden, as stated in the syllabus, "Respondent, a member of a local plumbers' union in Shreveport, La., arrived in Dallas, Tex., looking for a job with a construction company on a particular bank construction project there. Although the foreman of the construction company wanted him, he was unable to get the job, because the company's hiring was done through union referral, and the business agent of petitioner, the local plumbers' union in Dallas, refused to refer respondent. Respondent sued petitioner in a Texas State Court, seeking damages for such refusal and alleging that petitioner's actions constitute a willful, malicious and discriminatory interference with his right to contract and to pursue a lawful occupation; that petitioner had

breached a promise implicit in the union membership arrangement not to discriminate unfairly or to deny any member the right to work; and that it had violated certain state statutes: Petitioner challenged the State Court's jurisdiction." 373 U.S. 690, 691. The court held that the conduct of the union was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and hence the state court was precluded from exercising jurisdiction. The court said the case was to be distinguished from Gonzales in that Gonzales "* turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied. * * * The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages." 373 U.S. 697.

The Perko case involved a plaintiff who was a member of the union. He sued the union and certain of its officers to recover damages resulting from the acts of defendants in demanding that he be discharged from his duties as a super-intendent or foreman. He was discharged and alleged that defendants prevented him from obtaining work as a foreman by representing that his foreman's rights had been suspended. Plaintiff obtained a substantial judgment in the state court and the Supreme Court granted certiorari. In holding that the state court had no jurisdiction the court stated that "As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to in-

ternal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' Supra, p. 703. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." 373 U.S. 705.

A state court case supporting appellant's contention is Bailer v. Local 470, International Teamsters, etc., 400 Pa. 188, 161 A. 2d 348, 346. Therein the following appears: "Appellant avers in his first claim that the appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act, since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment * * *." On the other hand, a state court case tending to support the position of defendants is Webster v. Midland Electric Coal Corp., 43 Ill. App. 2d 359, 193 N.E. 2d 22[7].

Upon casual consideration it may appear that Borden and Perko conflict with Gonzales. However, it certainly must be said that those cases do not overrule Gonzales, by implication or otherwise, because both of them refer to and distinguish that case. We think it is clear that Borden and Perko are distinguishable, upon the facts, from the case before us. In Borden the union agent willfully refused to let Borden work even though the prospective employer requested that he be referred for a job. Perko lost his job as a foreman because of a dispute with the union as a result of which the union informed Perko's employer that the men would no longer take orders from him.

If, by subsequent opinions, the court has restricted Gonzales and Russell to the precise factual situations there involved (expulsion from the union and interference with employment by mass picketing and threats), then those cases would not apply in a determination of the case at bar. However, our reading of the various cases does not convince

us that such a restricted application of those cases is warranted.

We have concluded that the "Labor Management Relations Act," 29 U.S.C.A., §§ 157 and 158, has not preempted the jurisdiction of the Missouri courts in the case before us. While we think the facts in this case more strongly support state jurisdiction than the facts in Gonzales, we nevertheless are of the opinion that the Gonzales case is decisive of the issue before us.

We do not think that it could reasonably be argued that the conduct of defendants constituted an unfair labor practice in violation of § 158, supra. Defendants, contend that such was an unfair labor practice in that it violated § 158(b) and (b) (2) which read, in part, as follows: "It shall be an unfair labor practice for a labor organization or its agents-* * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection, (a) (3) of this section * * *." Sections (a) and (a) (3) referred to in the foregoing provide that: "(a) It shall be an unfair labor practice for an employer - * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." It appears obvious to us that those provisions do not apply to the factual situation before us. Here the union had nothing to do with Owens being discharged. It is evident that the, idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the "fifth step" and

thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim.

Some of the cases have said that Gonzales involved an internal union matter not directly concerning a matter of employment. Such statements may be technically correct but as a practical matter the real complaint of Gonzales was his inability to obtain employment because of his expulsion from union membership. We see no difference in that situation and the situation in the instant case. We are dealing with an internal union matter in that Owens complained of the refusal of the union to fully process his grievance. He, like Gonzales, hoped that as a result of proper union action he would be restored to his employment. If Gonzales involved a purely internal union matter then the case at bar involves a purely internal union mafter. The Gonzales case is clearly applicable here and is ample authority for our conclusion that jurisdiction of the subject matter of this case has not been pre-empted by the Labor Management Relations Act, 29 U.S.C.A., §§ 141, et seq.

Defendants have briefed two alternative contentions which they say support the action of the trial court in entering judgment for them even though we should hold (as we have) that jurisdiction of the subject matter of this claim was not pre-empted by the Labor Management Relations Act, supra. The first of those contentions is: " * that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim." In considering that point we will view the evidence in the light most favorable to appellant. The essential issue submitted to the jury was whether the union, as plaintiff's agent: "* * arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if

It will be noted that the property of punitive damages specified in the verdict was \$3,300. Reference to the petition discloses that the prayer for punitive damages was in the amount of \$3,000. Before the judgment is releastered, as hereinafter directed, plaintiff should be required to file a remittitur in the amount of \$300.

The judgment is reversed and cause remanded with directions to reinstate the verdict and judgment for plaintiff.

The surrection is made between North and the Laurence House of Pacture of It. her matter, and to be tween the world Union teles to both Manager of Pacture of Pac

PARCHON IN THE SECTION IN THE SECTIONS AND DEMOTIONS.

"(25" If all childhot wife, it the bounds of un Company. a physically unable to perform his regular assignment de his regular assignmented desires to be assigned to a too in his own department caving the same or a lower rate rolan the rate of his own regular assignment or assignments he may tille with the foreman of the department a written sendant no ed llade saving third, do done or becomes ad an tadt tha foun set forth in Exhibit IV attached hereto and made a mere bereed. When we'll job becomes open or vacant for promotion purposes, such eastlore shall be assened to dust jobi provided, he has onere department renionly effect than the employe to whom the job would normally be even under the provisions of Subparagraph (a) above or than any other earslove who has requested assignment to such job dider this bulgarage plat (b) (b); and sarehir sprovided when in the common of the Company has an perform such jobs at the mentarives, two (1) is subsequentable employee, shall meet

with the designated committee appointed by the Company, not to exceed three (3) in number, including the plant superintendent or his representative, for the purpose of settling the grievance. The position taken by the Company in this step shall be presented to the Union in writing within five (5) days from the presenting of the grievance in this third step.

Found Step and and or tembers to resinguise aid in

If not settled in the third step, then either party may refer the grievance to the General Superintendent of the Company or his designated representative or representatives and to the national representatives of the Union to assist in settlement of the grievance. Upon request of the National Union the Company will hold the fourth step grievance meeting in the city of the plant involved. Within 10 days after receipt of a written request from the National Union for a Fourth Step grievance meeting, the parties will set a mutually satisfactory date for the holding of such a meeting.

Fifth Step

If not settled in the fourth step, then the National Union may refer the grievance to Gabriel N. Alexander as Arbitrator, whose decision shall be final and binding upon the parties. In making said decisions, the Arbitrator shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance.

SECTION XIV HEALTH AND WORKING

Sickness and Accident

of deability due to alchess or noncompensable accident, and when such absences and their continuation are sup-

that by acceptable medical evidence, part wage payments that be made in accordance with the terms and conditions bereinafter list forth. The Company agrees that if there is an apparent conflict between the employe's physician and the Company as to the physical ability of the employe to perform whatever work the Company might have available for the employe, the physician employed by the Company will communicate with the employe's physician for the purpose of resolving the conflict.

(2) All absences shall be considered as starting with the loss of the first full day on which the employe was scheduled to work, provided that where an employe, because of disability due to sickness or noncompensable accident, is obliged to leave work before he has completed four (4) hours of his scheduled work day, his absence shall be considered as starting with that day.

Service Requirements in strength by beouter someth

(b) (1) Subject to the provisions of the following Subparagraph (b) (2), an employe will qualify for payments under this Paragraph 6 if, at the onset of his disability:

be sing. The Company's employment records show that he erembas one (1) year's accumulated of one (1) year's continuous service; and To Molque out of alderove?

broodbuilde is accumulating service as defined in Paragraph 11, of this Section XIV became and this section XIV

Amount of Payment

(d) The amount of payment shall be a percentage of wages computed in accordance with the following schedule and on the basis of a forty (40) hour work week at the employe's regular rate of pay or, in the case of employes who have a basic work week either greater or less than forty (40) hours, the percentage of wages computed on the basis of such basic work week at the employe's regular rate of pay:

50% for the first week of disability compensable under this Paragraph 6 the some brooms is sheet of the

55% for second consecutive week of disability compensable under this Paragraph 6

60% for third and fourth consecutive weeks of disability is av compensable under this Paragraph 6 and a more

65% for the fifth and subsequent consecutive weeks of disability compensable under this Paragraph 6.

For absences less than a full work week, daily payments for each day of absence that falls within the employe's weekly guarantee period shall be one-fifth (1/5) of the weekly payment computed as per the above schedule. No payment shall be made for absence on the employe's sixth or seventh scheduled work day in such week. Extent of Payments

(e) The greater of either of the following for any one absence reduced by the payments made for other absences during the twelve (12) months immdiately preceding the onset of the current absence;

1. Two (2) weeks at wages figured in accordance with the preceding paragraph for each year of accumulated service or of continuous service, whichever is the more favorable to the employe; or

2. Thirteen (13) weeks at wages figured in accordance with the preceding paragraphide in, I I done

tmough of Paymont, w. Con Hichard Struggle (d) The apoint of payment shall be a percentage of wages compared in accordance with the following schedule and on the basis of a forth (40) hour work week as the cine playe's regular fate of pay or, in the case of employes who have a healt work week either greater or less than forty (40) hours, the persturbage of mages computed on the basis of such liquid north week at the employe's regular rate of pay:

suction's

MICROCARD. TRADE MARK (R)



MICROCARD EDITIONS, INC.



CARD 6

of religid to carry raid grismach, difference and disegreenests if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects

We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were quittent to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this paint adversely to defendants.

The other alternative content on is that the judgment for defendants should be affirmed because "" it was shown that the fourth step of the grievance was held open and not completed autil almost the time of the trial of this cause of action and after the filing of the same and that, as a consequence thereof, the plaintiff has failed to exhaust his administrative and contricust remedies." That point is without unerity Defendants' assistance showed that they were in complete control of the management of plaintiff's grievance. One of the defendants failed to convex several letters he received from plaintiff's attorney inquiring as to what future action was contemplated concerning the grievance. Finally, without plaintiff's opened, the defendants withdress at 15 plaintiff failed to substant his administrative remedicals was confusly the facility of defendants. It is plaintiff the defendant to defend the substant his plaintiff the plaintiff of the defendants withdress at 15 plaintiff the facility of defendants. It is plaintiff that defende to this claims to fill not be bound to interpret in a defense to this claims as a defense to this

le sail be noted to xiquesta of punitive damages

Excerpt: from Agreement Between Swith & Company and National Brotherhood of Packinghouse Workers Covering the Period September 1, 1959 to September 1, 1961:

and he judgment is reve**ntioned and remanded** with direct

This agreement is made between Swift & Company (here-inafter called the Company) and the National Brotherhood of Packinghouse Workers on behalf of itself and the Local Unions set forth in Section II (hereinafter, unless otherwise indicated, the word "Union" refers to both National Brotherhood of Packinghouse Workers and the Local Unions).

PROMOTIONS AND DEMOTIONS

Physical Disability

mane actemedy to defendents .

(2) If an employe who, in the opinion of the Company, is physically unable to perform his regular assignment or his regular assignments desires to be assigned to a job in his own department paying the same or a lower rate than the rate of his own regular assignment or assignments, he may file with the foreman of the department a written request that he be assigned to such job. Such request shall be on the form set forth in Exhibit IV attached hereto and made a part hereof. When such job becomes open or vacant for promotion purposes, such employe shall be assigned to that job, provided, he has more department seniority either than the employe to whom the job would normally be given under the provisions of Subparagraph (a) above or than any other employe who has requested assignment to such job under graph (b) (2), and further provided that in he opinion of the Company he can perform such job we same in the state of the state

with the designated UIX iNOTESTATE by the Company -uz maid of HANDLING OF GRIEVANCES on the

projuted on his reprofessive, for the playone of senting 2. Should differences arise between the Company at Union or between the Company and employes of between employes of the Company, or should any local trouble of any kind arise in the plant, pertaining to matters involved in this agreement or incident to the employment relation, such differences will be handled through the grievance procedure in the following manner and order; and it is the declared policy of the parties hereto that all such matters shall be settled as promptly as possible

mentional the fried tages, deponded on the National Rein

Bither: Someone grace tourist the blod the gracemon add

a. The aggrieved employe may present his grievance with or without the Union representative to the foreman of the department, or million at rol sate loren

the cittle of the plant involved. Within 40 daments

b. In cases where the Union is the aggrieved or the employe refuses to present his grievance, the employe Union representative or representatives (not exceeding three (3), with or without the aggrieved, may present the grievance to the foreman of the department inentranolement othe paradon of the transcent volved. bound and governed by the provisions of this commet and

Second Step as a stand one of mountaining in in libitation

If not settled in the first step, then the aggrieved, with or without not to exceed two (2) Union representatives, one (1) of whom shall be an employe of the Company, may present the grievance to the division superintendent or general foreman, whichever is selected by the Company. All griev-ances presented in this step shall be in writing. do of a torry (4th) forth work whose at

Third Step

sulf not suffer in the stood step, then the gricks not committee, controved of any more than three (8). U contained two (2) of whom shall be explored

TABLE OF CONTENTS

Motion of Swift & Company for Leave to File Amicus Curiae Brief
Amicus Curiae Brief of Swift & Company in Support of Petition for Certiorari
Interest of Amicus Curiae
Argument
Conclusion
TABLE OF CITATIONS
Black-Clawson Co., Inc. v. International Assn. of Machinists, 313 F.2d 179 (1962)
Humphrey v. Moore, 375 U.S. 335 (1964)
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 1
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)
United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)
. All and the second se

TABLE OF CONTENTS

Motion of Swift & Company for Leave to File Amicus Curiae Brief
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Interest of Amicus Curiae
Argument
Conclusion
TABLE OF CITATIONS
lack-Clawson Co., Inc. v. International Assn. of Machinists, 313 F.2d 179 (1962)
Sumphrey v. Moore, 375 U.S. 335 (1964)
epublic Steel Corp. v. Maddox, 379 U.S. 650 (1965)
nited Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)9-
nited Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)
nited Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1267

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT, Petitioners,

VS.

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

MOTION OF SWIFT & COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Swift and Company respectfully moves the court for leave to file the attached brief, as amicus curiae, in support of the above captioned Petition for Writ of Certiorari to the Supreme Court of Missouri, as provided in Rule 42° of the Rules of this Court.

The consent of the attorneys for the petitioners herein has been obtained but the attorney for the respondent herein has refused to consent to the filing of such a brief by Swift & Company.

While Movant is interested in the pre-emption question presented by petitioners' Petition for Certiorari, Movant does not desire to take a position thereon or to brief it in this case. However, because of the impact of the question of fair representation upon the continued existence of a sound grievance procedure with the concomitant rights of a Company to rely on the authority of the bargaining representative in the grievance procedure and of Union representatives to exercise their judgment in the handling of a grievance, Swift & Company should be entitled to file a brief in support of the Petition for Certiorari. The interest and concern of Movant in this question is set forth and demonstrated in the attached brief.

WHEREFORE, Swift & Company prays the court for leave to file the attached Amicus Curiae Brief in Support of the Petition for Certiorari herein.

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SUPREME COURT OF THE UNITED STATES

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No. 1267

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT, Petitioners,

VS.

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

AMICUS CURIAE BRIEF OF SWIFT & COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

The Amicus Curiae Brief of Swift & Company is submitted subject to favorable action on the motion for leave to file to which it is attached, counsel for the respondent having refused consent that it be filed.

INTEREST OF AMICUS CURIAE

Swift & Company is engaged in business throughout the United States and employs approximately 45,000 persons in its United States plants and facilities. Of this total number of employees, approximately 32,000 are hourly-paid employees. Of this latter group, approximately 82.5% are in a bargaining unit for which various Unions are the collective bargaining representatives.

a

The petitioners involved in the case presented here were sued as representatives of and as a class representing the National Brotherhood of Packinghouse Workers (hereinafter referred to as the "NBPW") and its Local No. 12 (hereinafter referred to as "Local No. 12"). The NBPW and its Local No. 12 are the collective bargaining agent for approximately 1,360 employees in a bargaining unit at Movant's Kansas City, Kansas, Meat Packing Plant. In addition, the NBPW (and one of its several local unions) represent employees of Movant in bargaining units at seven other Swift & Company meat packing plants located in the United States. "At these plants, such Union is the collective bargaining agent for a total of approximately 5,600 employees.

At still other meat packing plants of Swift & Company in the United States, approximately 12,400 employees are in bargaining units represented by either the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO) or the United Packinghouse, Food and Allied Workers (AFL-CIO). In units and facilities of Swift & Company other than meat packing plants, there are approximately 8,400 employees in about 317 separate bargaining units which are represented by Unions. In sum total, Swift & Company is signator to more than 300 collective bargaining agreements with the various Unions that represent the aforementioned employees.

For Swift & Company, as for other employers whose employees are represented by Unions, it is essential that the collective bargaining relationship between the Company and the Unions representing its employees be a workable system. Of vital importance in such a system

^{*}Now known as the National Brotherhood of Packinghouse & Dairy Workers.

is the existence of an orderly method by which grievances are to be processed and handled through the grievance procedure, including the right of the grievant's Union representatives to settle or withdraw a particular grievance claim at some point in the grievance procedure without processing it further when such Union representatives determine that the facts of that particular grievance warrant such disposition.

It is the opinion of Movant that the decision of the Supreme Court of Missouri, particularly as it relates to the standards of fair representation of an employee by his Union through the grievance procedure, seriously undermines the orderly administration of the grievance procedure in every collective bargaining agreement. it serves to undermine the entire collective bargaining relationship. The decision of the Supreme Court of Missouri in effect holds that if there is any evidence in a given case that would permit a jury to determine that a grievant had a meritorious claim, then the Union representing him may be found guilty of unfair representation in not carrying the matter through all steps of the grievance procedure and into arbitration. In effect, a jury is asked to pass upon whether or not the grievant's claim did indeed have merit after a Union in its honest judgment and with its thorough knowledge of the particular industrial scene determined that that particular grievance lacked sufficient merit to warrant further processing.

Thus faced with the possibility of defending a damage suit, with all of its expenses and uncertainties, brought by every unhappy grievant whose claim was not processed through the entire grievance procedure, a Union would undoubtedly choose to press a large number of grievances through the entire procedure—including ar-

bitration-regardless of whether the grievance was meritorious or not. The cost of this in time and money to Unions, employees and employers would be tremendous. Worse still, it would result in the complete breakdown of an orderly, workable grievance procedure which is of such vital importance to the collective bargaining process. The destruction of a sound grievance procedure would ultimately hurt the employees, the Unions and the employers. Furthermore, such undermining of the authority and responsibility of the bargaining agent with respect to the administration of the collective agreement immediately could raise a question of a Union's authority in the collective bargaining process itself. It seems to necessarily follow that if every elevant dissatisfied with his Union's handling of his grievance can take his case to court. then an employee dissatisfied with any part or all of a contract negotiated by his Union could be entitled to do likewise.

Suit has also been filed on behalf of Mr. Benjamin Owens against Swift & Company claiming \$10,000.00 damages on account of the Company's failure to return Mr. Owens to work in January, 1960. The case was not brought to trial prior to Mr. Owens' death on December 8, 1964, it has not been revived and, under Movant's interpretation of the law of Missouri, the right of revival has been lost. If his administrator prevails in the present case, Movant would have an additional defense. Nevertheless, despite its seeming advantage in seeing Owens' administrator prevail in the case now before this court, the chaos created by his so doing causes such great concern to Movant that it must support the petitioners in their Petition for Certiorari.

ARGUMENT

It should be self-evident that the rights of an individual employee must be respected in the collective bargaining process and in the administration of the collective bargaining agreement and that the employee is entitled to fair representation by the Union representing him. At the same time, the entire thrust of the national labor policy is the establishment and preservation of a collective bargaining system where the rights of the individual must necessarily be related to those of the group. The group, or its Union representative cannot discriminate against the individual or practice fraud or deceit as to him but so long as it in good faith fairly represents him he should be bound by its actions.

It is submitted that the decision of the Supreme Court of Missouri in the instant case has gone far beyond the establishment of a reasonable standard of fair representation and would allow every individual grievant who is dissatisfied with a decision of the group or its representative or who thinks that it may have been erroneous in its judgment in handling his particular grievance to have that decision or judgment reviewed by a court or jury. To let such a rule stand would be disastrous to the collective bargaining system and the administration of the grievance procedure in a collective bargaining agreement.

Perhaps if the NBPW had taken the Benjamin Owens case to arbitration it would have prevailed and he would have gotten his job back. Swift & Company does not think so. It denied the grievance through the first four steps of the grievance procedure based upon the very substantial evidence it had in the form of Doctors' reports that Owens had severe heart damage, hypertension and was a very sick man whose health did not allow him to work. The

soundness of this judgment is borne out by the fact that Mr. Owens died on December 8, 1964, from a "cardio vascular accident due to hypertension," the very thing feared if he was returned to work.

That an arbitrator might have found for Owens is immaterial. The statement of the Missouri Supreme Court (397 S.W.2d l.c. 665) that "we have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff" (followed by a summary of medical evidence in his favor) is just as immaterial. It establishes a completely unworkable standard for the resolution of disputes under collective bargaining agreements.

Every grievant must feel that he has some basis for his complaint. Understandably, employees who lose their jobs or are disciplined, demoted, transferred to an undesirable job, laid off or who do not realize promotion see only their particular problem. It is only human nature for any grievant to have more or less of a feeling of dissatisfaction if his complaint is not resolved completely in his favor but it is equally true that not all grievances are, or should be, taken to arbitration. For example, at Swift & Company's meat packing plants for the period 1959 through 1965, Company records show that approximately 1,661 cases were taken by the Unions into the fourth step of the grievance procedure. (The Union taking the case into the fourth step would be either the National Brotherhood of Packinghouse Workers, the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO) or the United Packinghouse Food and Allied Workers (AFL-CIO) depending on which Union had the bargaining rights at the particular meat packing plant involved.) Of this total number of 1,661 cases entering the fourth

step, Company records show that 1,247 grievances were disposed of by some form of settlement, including withdrawal by the Union in some cases, 377 grievances were "held open" and are still in that status today and only 37 cases were taken to arbitration by the Unions. If each of the grievants whose case had been settled by a Union in the fourth step (or earlier) in a manner which displeased the grievant, or had been withdrawn by the Union in the fourth step (or earlier) or whose case still is being "held open" in the fourth step were entitled to complain "of the refusal of the Union to fully process his grievance," the results would be devastating.

If the standard of fair representation established by the Missouri Supreme Court is permitted to stand, the only way a Union can protect itself from the expense and hazards of a lawsuit by an unhappy grievant would be for it to take the case through arbitration and even then, if the grievant is still not satisfied, attempt to attack the arbitration award. In the meantime all sorts of problems pile up with respect to the remedy, often involving employees (other than the grievant) whose positions or rights may have been changed since the grievance. It is axiomatic that early and prompt disposition of grievances is essential to the orderly administration of a labor agreement and any effort to maintain industrial peace through a grievance and arbitration procedure.

The Supreme Court of Missouri, after disposing of the pre-emption questions, points out (397 S.W.2d l.c. 665) that one of the defendants' alternative contentions was:

"* * that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence to show that plaintiff had a meritorious claim." (Emphasis supplied)

It is submitted that the issue should be one of whether or not the Union acted in a discriminatory manner, was guilty of fraud, dishonesty or deceit or even possibly negligence; basically a question of good faith. It should not be one of whether or not the Union erred in its evaluation of the merits of the grievance.

As pointed out by Mr. Justice White in Humphrey v. Moore, 375 U.S. 335, 349 (1964):

"* * we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. * * * Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Just as in *Humphrey*, in the instant case, "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

Where a Union, as in Owens' case, has made a reasonable investigation of the circumstances and arrived at an honest judgment concerning the likelihood of success in pressing the grievance to arbitration, there should be no "second-guessing" by a court or jury. This should be true even though the Union's judgment might be one with which a court or jury would disagree. An analysis of the collective bargaining relationship and the need to maintain its integrity and recognition of the fact that there is no absolutely right answer to the myriad of issues that arise in the administration of a collective bargaining agreement can lead to no other conclusion.

In Black-Clawson Co., Inc. v. International Assn. of Machinists, 313 F.2d 179 (1962), the court had under con-

sideration the individual right of an employee, as distinguished from the right of his Union, to compel an employer to arbitrate his discharge grievance. In holding that he did not, the court in an opinion by Judge Kaufman, stated:

"Our conclusion is dictated not merely by the terms of the collective bargaining agreement and by the language, structure, and history of section 9(a), but also by what we consider to be a sound view of labormanagement relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee. every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. 'A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right * * *,' Ostrofsky v. United Steelworkers, 171 F. Supp. at 790, and inures to the benefit of all of the employees." (Emphasis supplied) (l.c. 186)

Chaos will also result if every dissatisfied grievant is permitted to test the good faith judgment of his Union in a suit for damages claiming unfair representation without alleging and proving discrimination, fraud, deceit, dishonesty or negligence.

This Court has emphasized the value of the grievance and arbitration procedure as a major factor, in achieving industrial peace, its stabilizing influence and that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards. United Steelworkers v. American Mfg. Co., 363

U.S. 564 (1960); United Steelworkers v. Warrior, & Gulf Navigation Company, 363 U.S. 574 (1960); United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This concern for the grievance and arbitration process will go for naught if the decision of the Missouri Supreme Court as it relates to the standard of fair representation is permitted to stand. The use of grievance and arbitration procedures will become so cumbersome, time-consuming, expensive and fraught with such uncertainties and perils that it will fail to serve its purpose in the industrial complex.

CONCLUSION

By denial of the Petition for Certiorari in this case, this Court will in effect place its stamp of approval on a standard of fair representation established by the Supreme Court of Missouri which seriously undermines the existence of a workable grievance procedure so necessary to the collective bargaining relationship. The grievance procedure will become so meaningless and such chaos will result that its continued effectiveness will be destroyed. The Petition should be granted.

Respectfully submitted,

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INDEX

	Page
Motion	
Interest of the AFL-CIO	iv
Issue Not Covered in the Petition	
Conclusion	v
Brief	
Reasons for Granting the Writ	2
Conclusion	.: 7
Citations	
	-
Cases:	
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)	· 2°
Simmons v. Union News Co., 381 U.S. 884 (1965)	
United Steelworkers v. Warrior & Gulf Nav. Co	
363 U.S. 574 (1960)	. 7
MISCELLANEOUS:	
Alexander: Impartial Umpireships: General Motor	rs
-UAW: in Arbitration and the Law: Proces	
· INGS, 12TH ANNUAL MEETING, NATIONAL ACADEM	
OF ARBITRATORS, 108 (1959)	
Blumrosen: Legal Protection for Critical Job Inte	r
ests: Union Management Authority versus En	
ployee Autonomy, 13 Rutgers L. Rev. 631 (1959)	. 2

IN THE

Supreme Court of the United States OCTOBER TERM, 1965

NO. 1267

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioner

v.

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION FOR LEAVE TO FILE A BRIEF AS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief amicus curiae in this case in support of the petition for a writ of certiorari, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and thirty-one affiliated labor organizations with a total membership of approximately thirteen million. The instant case involves a relatively small union which is not affiliated with the AFL-CIO. The questions presented, however, are of great importance to the institution of collective bargaining, and consequently to all unions.

Briefly stated, they are: What recourse does an employee have if his exclusive collective bargaining representative refuses to process his grievance through all of the available steps of a grievance and arbitration procedure established in the applicable collective bargaining agreement? May the employee bring a suit in court, or does his exclusive remedy lie before the National Labor Relations Board? In either case, what showing must the employee make in order to obtain relief? Finally, if he makes out a cause of action, what type of relief should be afforded?

More than 90 percent of all collective bargaining agreements in the United States provide a grievance and arbitration procedure similar to the one involved in the instant case, 2 Bureau of National Affairs, Collective Bargaining Negotiations and Contracts, 51:-6-7 (1965). Indeed, one of the principal functions of a union during the periods when such an agreement is in effect is to process the grievances that arise. The AFL-CIO, as spokesman for the majority of American unions and their members, therefore has a profound interest in the outcome of this case. For this reason it seeks leave to file a brief amicus curiae, in order to present the views of the labor movement as a whole as to why the petition for a writ of certiorari should be granted.

ISSUE NOT COVERED IN THE PETITION

We agree with petitioner (Pet. 22-23) that it is reasonable to anticipate that the main effect of the decision of the court below would be to force unions to press to arbitration nearly every grievance. This would work a radical change in the prevailing method of administering grievance and arbitration procedures and might well destroy this system for the peaceful settlement of industrial disputes. (Pet. 19) For this reason the accompanying brief amicus curiae is primarily devoted to an elaboration, including some statistics, of petitioner's brief reference to the present practice and the reasons that favor its retention.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief amicus curiae in the instant case in support of the petition for a writ of certiorari to the Supreme Court of the State of Missouri.

Respectfully submitted,

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May, 1966

IN THE

Supreme Court of the United States october Term. 1965

NO. 1267

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT

Petitioner

42

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

This brief amicus curiue is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as amicus curiue.

The opinions below, jurisdiction, questions presented, and the constitutional and statutory provisions involved are set out on pages 1-3, 25-27 of the petition.

The interest of the AFL-CIO is set out on page iv of the foregoing motion for leave to file a brief as amicus curiae.

REASONS FOR GRANTING THE WRIT

Despite the fact that it has been the continuing object of study by responsible commentators, and of continuing litigation in the lower courts, this Court has yet to address itself to the difficult and significant primary question squarely presented in the petition here—the exact scope and nature of the recourse open to an employee when his exclusive bargaining representative refuses to process his grievance past a certain step in the grievance and arbitration procedure provided for in the applicable collective bargaining agreement, see, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Simmons v. Union News Co., 381 U.S. 884 (1965). As the petition indicates (Pet. 15-16, 20-22), the decisions of the lower courts are in hopeless disarray as to every aspect of this problem. The same may fairly be said of the pertinent, scholarly literature. See, e.g., Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Cox; The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957); Blumrosen, Legal Protection for Critical Job Interests: Union Management Authority versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959), Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U. L. Rev. 362 (1962). The present case offers this Court an excellent opportunity to clarify this important area of the law. We believe that such clarification is essential.

1. The basic position of the AFL-CIO is that the requirements for a well functioning grievance and arbitration

procedure, upon which the success of the federal labor policy of encouraging the peaceful settlement of disputes depends, dictate that a large measure of reasonable discretion be allowed unions in determining which grievances to settle and which to press to arbitration.

Claims by employees that the employer has taken some action which violates the applicable collective bargaining agreement arise daily. Their resolution through contractual procedures, terminating in arbitration, similar to those provided in the agreement involved in the instant case, is normally the union's principal collective bargaining function during the contract term. At the present time, both companies and unions act on the theory that each of the parties to the agreement has an obligation to screen out grievances by settling them in the lower steps of the procedure. It is understood, in other words, that there must be a willingness to reach a meeting of the minds, rather than to remain firm on each grievance. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit. In at least one case this obligation has caused both parties to set up formal internal screening procedures, see Alexander, Impartial Umpireships: General Motors.-UAW; in Arbitration and The Law: Pro-CEEDINGS, 12TH ANNUAL MEETING, NATIONAL ACADEMY OF Arbitrators, 108, 128-129 (1959). Moreover, as a reflection of this understanding, any grievance procedure in which a substantial portion of the grievances filed are taken to arbitration is regarded as a failure, a "distressed" situation requiring remedial action. See the discussions by the present Director of the Bureau of Labor Statistics, Arthur M. Ross, in Ross, Distressed Grievance Procedures and their Rehabilitation, in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS, 16TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 104, 107 (1963), where it is noted that the most frequent cause of such distressed procedures

is the "refusal of international and local union officers to screen out the grievances...."

To illustrate how the grievance and arbitration procedure works pursuant to current practices, the AFL-CIO has obtained from its two largest affiliates, the United Steelworkers of America and the United Automobile Workers, figures showing the number of grievances settled in the lower steps of the grievance and arbitration procedure provided for in the collective bargaining agreements between these unions and two employers, United States Steel Corporation (ore mines and basic steel operations) and General Motors Company.

The figures for General Motors are as follows:

Year 1959		
Written Grievances	89,40	08
Settled1-Step One	53,98	61.0%
Settled-Step Two	25,63	28.9%
Settled-Step Three	8,86	3 10.0%
Settled—Umpire		35 0.04%
Year 1962	a	
Written Grievance	114,61	1
Settled—Step One	72,99	9 66.0%
Settled-Step Two	26,69	4 - 24.1%
Settled-Step Three	10,84	9.8%
Settled-Umpire		0.03%

The figures for United States Steel are:

Years 1960-1965				
Grievances Processed	Beyond	First	Step ²	24,351
Settled—Step Two	9			38%
Settled—Step Three		. 8 1		21%

[&]quot;Settled" as used here refers to grievances which are granted, compromised or dropped.

No record is kept of the number of grievances filed but settled in the first step.

Settled—Step Four	31%
Docketed for Arbitration	10%
Settled—Arbitration	5.6%

These figures show not only that most grievances are in fact settled in the lower steps, but more importantly that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties refused to settle the vast majority of grievances short of arbitration. This point is especially clear once it is realized that in most cases the agreement provides that the employees must, without protest, accept, and work under, the employer's decision until he agrees to reverse it or is ordered to do so by the arbitrator. At the present time the inevitable delays which occur when a case goes through all the grievance steps, and which must be anticipated in even the most efficient administrative system. are not regarded as an insupportable burden because it is realized that prolonged proceedings are the exception rather than the rule. This, of course, would no longer be true if most grievances were processed to arbitration. Moreover, since the higher steps are normally more formal than the lower (Pet. 53-54), it can be anticipated that under any practice other than the present one the procedure would become clogged and that a grievance going to arbitration would take longer to decide than the same grievance would today.

There is already some indication that the confused state of the law as to the nature and scope of the union's legal obligation to employees in handling their grievances has resulted in an increasing reluctance on the part of some unions to settle grievances. Thus, a report of a speech by Joseph Murphy, Vice President of the American Arbitration Association, in the April 25, 1966 issue of the Labor Relations Reporter states:

"Discipline cases continue to lead as far as types of disputes going to arbitration are concerned, Murphy said,

In 1965, 28.1 percent of cases involved discipline. This represents little change from the 28 percent figure for 1964. However, Murphy observed that in the first three months of 1966, the figure was up to 39 percent. He called this 'shocking' and predicted that the figure will be reduced over the course of the year.

"The high percentage for early 1966, Murphy said, may be attributable to pressure on unions to move to protect individual employee rights. In earlier years, he remarked, unions were victorious in discipline arbitrations in about 80 percent of cases. That figure is now reduced to 50 percent—an indication that unions will take up any discharge rather than risk defending a suit by the discharged employee." 61 LRRM 242 (emphasis added).

We believe that this impact on the prevailing system of grievance settlement, which can only become more pronounced as a result of this decision of the court below, is so serious as to warrant review by this Court.

2. We have nothing to add at this time to petitioner's discussion of preemption or of the content of the governing federal standard (Pet. 2, 11-13) except to note that we agree that these questions are important and should be resolved by this Court. Assuming for the moment that there is a possibility that the Court might reach the third of the questions presented (Pet. 2), we do however, wish to briefly note what we believe to be a fundamental error, as to the proper remedy, made by the court below.

The employee's claim here is that the Company unilaterally violated the collective bargaining agreement and that the union's wrong was simply that it refused to press the matter to arbitration, thereby permitting the basic wrong to go uncorrected. Yet the employee was allowed to seek and recover damages from the Union. The Company, who on the employee's theory was the principal wrongdoer in this case, was not even joined as a party, and was not required in any way to share the Union's liability.

We believe that such a result is clearly unfair and that when an employee makes out a cause of action under the proper standard, and some relief is therefore warranted it should be limited to an order directing the union to take the grievance to arbitration, and perhaps directing the arbitrator to allow the employee to represent himself if necessary, and to apportion whatever liability is found between the company and the union. This would assure that the final judgment as to whether the agreement has in fact been violated would be made by an arbitrator, as the agreement itself contemplated, rather than by a court or a jury. Cf United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 577-82 (1960). It would also assure that if a violation of the agreement is ultimately found, the remedy would be that provided in the agreement (reinstatement and back pay) rather than an award of damages, as in this case.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX

Questions Actually Presented by the Case	-1
Statement Supplemental to Petitioners'	2
Reasons for Denying the Writ	5
As to Cases Cited by Petitioners	14
Conclusion	18
Supplement	21
Conclusion	22
Second Supplement	22
	,
TABLE OF CASES	1
Bailer v. Local, 161 A.2d 343 (Penn.)	14
Black-Clawson v. International, 313 F.2d 179 (1962,	
C.A. 2)	21
Brandt v. U. S. Lines, 246 F, Supp. 982 (U.S. D.C. N.Y.	
1964)	17
Chiappazzi v. Machinists, 48 Labor Cases, Sec. 50949, page 6387	13
Cortez v. Ford, 84 N.W.2d 523 (Sup. Mich.)	17
Cosmark v Struthers 194 A 2d 325 (Penn)	15
Denver v. Shore, 287 P.2d 267 (Colo.)	14
Donnelly v. United, 190 A.2d 825 (Sup. N.J. 1963)	16.
Dowd v. Courtney, 368 U.S. 50210, 11,	
Fingar v. Seaboard, 277 F.2d 698 (C.A. 5)	14
Ford v. Huffman, 345 U.S. 33011, 15,	
Freedman v. National, 347 F.2d 167 (C.A. 2, 1965)	16
Giba v. International, 205 F. Supp. 553, 556 (1962)	14
Gilbert v. Hoisting Local, 384 P.2d 136, cert. den. (Ore. 1963)	14
Grumwald-Marx v. Los Angeles, 343 P.2d 23, 32 (Cal. 1959)	14
Guzzo v. Steelworkers, 47 LRRM 2379 (Cal. Sup.)	14
Hiller v. Liquor Union, 338 F.2d 778 (C.A. 2)	16

Humphrey v. Moore, 375 U.S. 335 (Ky. 1964)11, 14
Humphrey v. Thyer, 48 Labor Cases, Sec. 50947 (U.S.
D.C. Mas. 1963)
Independent v. Socony, 197 A.2d 25, 32; 205 A.2d 79 (N.J.)
International v. Gonzales, 356 U.S. 617 (1957)
8, 9, 10, 11, 12, 18
International v. O'Brien, 339 U.S. 454
International v. Russell, 356 U.S. 6348, 9, 10
International v. Shawnee, 224 F. Supp. 347 (U.S. D.C. Okla. 1963)
International v. Superior, 296 P.2d 395 (Cal.) 14
Knowy International 223 F. Supp. 1009
Linn v. United, 86 S. Ct. 657 (1966) 8, 12, 13
Local 100, United v. Borden, 373 U.S. 690
Local 174 v. Lucas, 369 U.S. 95 (1962)
Local 207, International v. Perko, 373 U.S. 701 17
Mahoney v. Sailors, 275 P.2d 440, cert. den. (Wash.) 14
McCarroll v. L. A. Council, 315 P.2d 322, cert. den. (Cal.
1957)
Moore v. Illinois Central, 312 U.S. 630 (1941) 16
Morris v. Brotherhood, 338 S.W.2d 777 (Mo. Sup.) 23
Narens v. Campbell, 347 S.W.2d 204 (Mo. Sup.) 14
NLRB v. Local 294, Teamsters, 317 F.2d 746 (C.A. N.Y.
1963)
NLRB v. Miranda, 326 F.2d 172 (C.A. 2, N.Y., 1963) 14
NLRB v. Murray, 326 F.2d 509 (C.A. 6, Tenn. 1964) 14
NLRB v. Symons, 328 F.2d 835 (C.A. 7, Ill. 1964) 14
Ostrofsky, 171 F. Supp. 790
Radio v. Local 780, 48 Labor Cases (L. C.), Sec. 18716 (Fla. Dist. Ct. of Appeals, 160 So.2d 150)/14
Populitie v Maddor 379 HS 650 (1965)
San Diego v. Garmon, 359 U.S. 236
Simmons v. Union News, 15 L. Ed. 2d 125, 60 LRRM 2255 (1965)
Smith v. Evening News, 37,1 U.S. 195 (Mich. 1962)11, 17

INDEX	in
State v. Local, 317 S.W.2d 309, 321 (Mo. Sup. banc)	14
Steele v. L & N, 323 U.S. 192	15
Stewart v. Day, 294 F.2d 7 (C.A. 5)	17
Stout v. Construction, 226 F. Supp. 673	15
	14
	12
United v. LaBurnum, 347 U.S. 656 (1954)8,	13
	16
	16
Young v. United, 216 A2d 500	16

No. 1267

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

MANUEL VACA et al. AS OFFICERS AND MEMBERS
OF NATIONAL BROTHERHOOD OF PACKINGHOUSE
WORKERS,
Petitioners,

VS

NILES L. SIPES, AS ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED,

Respondent.

RESPONDENT'S ANSWER BRIEF TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS ACTUALLY PRESENTED BY THE CASE

1. Does a State Court have jurisdiction to entertain an action by a member against a Union for actual and punitive damages, based upon pleading and proof (not based upon discrimination) that the Union, as the member's representative, breached a collective bargaining agreement

with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth arbitration step of a grievance procedure set forth in the bargaining agreement (see opinion, last paragraph, of Supreme Court of Missouri, page 49, of Petitioner's Appendix A)?

2. Does federal law authorize a State court to award damages against the Union under the circumstances in question 1, upon a showing of arbitrary action, done with legal malice, where the petition sought actual and punitive money damages, for breach of contract, but did not request specific performance by an order to arbitrate or to restore the employee to his job?

STATEMENT SUPPLEMENTAL, TO PETITIONERS'

For patent economic reasons, respondent, as administrator for the family of Benjamin Owens, Jr., is unable to furnish the Court with re-prints of the two briefs of this respondent, in the Kansas City Court of Appeals, as utilized in the Supreme Court of Missouri, but attaches available copies hereto and incorporates the Statement therein, by reference. Petitioners, of course, have copies thereof.

Additionally, respondent requests this Court to consider the Statement of Facts made by the Supreme Court of Missouri in its opinion as adopted by respondent; this should be supplemented by the evidence in the transcript of record, from the trial court, that, according to petitioners' witness, Jamerson (the Union's business representative), the sixteen man Executive Board of the Union voted to go on to arbitration, and that Jamerson agreed that Owens' grievance was meritorious (Transcript, pages 158, 161, 162,

163; the record as certified by the Clerk of the Supreme Court of Missouri is not available to respondent, so that page numbers cannot be given; however, pertinent excerpts commence at the 14th question before the close of the direct examination of Jamerson, by petitioners' counsel), as follows:

- "Q. (By Mr. Panethiere) Then you moved that they take it to the fifth step, and you had a second.
 - A. Yes.
 - Q. Did you have a vote on it?
- A. Oh, yes.
 - Q. What was the result of the vote, Mr. Jamerson?
- A. To go, to take it on to the fifth step."

 And commencing with cross-examination, this occurred:
 - "Q. And you thought he was right, didn't you, Mr. Jamerson?
 - A. Thought Ben was right by telling me that?
 - Q. No, no, of course, by saying that, but I am talk- ing about that he should have been taken to the fifth step to give him a chance to present his case, didn't you? You favored that, didn't you?
 - A. Yes, I was representing him."

It should also be added that the employee had worked for Swift & Co. 16 years when discharged, and was eligible for a pension after 20 years (Transcript, pages 21, 28, 219).

Any demand of the local President, Vaca, if made, for \$300.00, as a prelude to action into arbitration was termed "outrageous" and "improper", by Union officials (Transcript, pages 173, 213). The \$300.00 demand was not dropped out of the case, as petitioners claim, page 4, but was prominently discussed in the Missouri Supreme Court opinion on pages 41 and 42 and in the Kansas City Appeals opinion, page 31.

. .

Union National Vice President, Kobett, during the time before he switched from favoring Owens' case, said that he belittled one of the two doctors who backed the employer (as against 6 for Owens), because the doctor had never seen Owens, but that sometimes as to a fact in issue, the Union "might twist it around a little bit-" (Transcript; pages 236, 242). Kobett admitted that the decision as to continuing to arbitration is an inside process in the internal workings of the Union and it was so decided (Transcript, pages 231, 232); that he felt that Owens case had merit to be processed through the four steps where the company officials decided it, but not through the neutral arbitrator (Transcript, page 233); that it was the Union's duty in matters involving grievances of employees against their employer to represent them faithfully (Transcript, page 189), to do all it can to work for the employee (Transcript, pages 190, 204), and to help the employee when his and management's interests conflict (Transcript, page 165).

The petitioners did not claim that the Union had anything to do with getting Owens discharged (Transcript, page 73). However, as to the feeling in connection with the Union clandestinely withdrawing Owens' grievance in the fourth step, Vaca testified (though he later attempted to recant), that the Union was entitled to withdraw the grievance in retaliation for Owens suing it (Transcript, pages 218, 219).

Before Owens commenced the instant action, he sought a ruling from the National Labor Relations Board, and received this ruling, dated September 16, 1960 (see K. C. Appeals opinion, page 21 of petitioners' Appendix):

"* * if it can be shown that a labor organization caused, or attempted to cause, an employer to discriminate against an employee in violation of Section 8(a)(3) for some pea-

son other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation."

In the fourth step, Owens' grievance against the employer was "withdrawn" by the Union about one month before the trial, without consent of, or presence of, or notification to Owens (Petitioners' Statement, p. 8, Transcript, pages 10, 198, 199, 201, 202, 235).

The medical reports from six doctors for Owens and two for the petitioners were admitted in evidence (Petitioners' Appendix 50).

REASONS FOR DENYING THE WRIT

1. Does a State Court have jurisdiction to entertain an action by a member against a Union for actual and punitive damages, based upon pleading and proof (not based upon discrimination) that the Union, as the member's representative, breached a collective bargaining agreement with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth, arbitration, step of a grievance procedure set forth in the bargaining agreement (see opinion, last paragraph, of Supreme Court of Missouri, page 49, of Petitioners' Appendix A)?

Notwithstanding the effort by petitioners and the offering by amicus curiae, the employer (strange bedfellows!), to build this simple case of arbitrary and legally malicious breach of contractual duty to represent Owens, as his agent, into a colossal, nationshaking Frankenstein, which would destroy America's labor-management procedure, paralyze industry, etc., the matter is no more than an uncomplicated occurrence which would never even have

reached the Supreme Court of Missouri had not the judges of the intermediate appellate court divided in their opinions. The seven members of the Court en banc of the Supreme Court of Missouri entertained no doubt as to the jurisdictionally and otherwise sound bases of the verdict for Benjamin Owens, Jr.

No discrimination was pleaded, proved, or submitted. The subject-matter involved an arbitrary decision, presumably by the petitioners' officers (against the vote of the Executive Board and by reason of failure of Owens to pay the \$300.00 "lug" to the local president, and in retaliation for this suit—clandestine dismissal of Step 4—as the jury may be considered to have found—not to pursue to the Fifth (arbitration) Step, a grievance for Owens, which they had, through the hearing in the Fourth Step, claimed was meritorious. Five doctors favored Owens, two (one of whom had never seen him and the other of whom was the Company doctor) were for the employer. The officers would give Owens no information as to the status, if any, of his grievance.

This is the milieu in which Owens first queried the National Labor Relations Board as to his forum for relief. They declined to take jurisdiction, unless discrimination was in the case, under Section 8(a)(3); of such discrimination, of course, there is no inkling in the evidence—no other employee nor the rights of anyone but Owens, were involved. This was purely an arbitrary action (since contrary to the yote of the Executive Board), an "outrageous" and improper demand for money, and a legally malicious breach of the faith due from an agent to its principal, Owens (who had a strong grievance, but was blocked by clandestine and retaliatory Union action).

der these facts, being declined by that body, and want of such jurisdiction clearly appearing, Owens resorted to the only available forum, the State Court (there was no diversity, so even if Owens had sued for more he could not have gone to the federal court). The National Labor Relations Board could not have awarded him punitive damages in any event; and he was not asking for specific performance by restoration, in the breach of contract action, but solely for money damages, actual and punitive.

After full and careful consideration of all issues presented, jurisdiction being the principal and possibly the only serious one, the Supreme Court of Missouri properly tagged the case for what it was—a breach of contract action, not involving any unfair, discriminatory labor practice, but based upon arbitrary and malicious failure to process Owens' grievance under the contract, by internal Union action.

The answer to Respondent's question 1, therefore, must be affirmative—the State Court had jurisdiction. And the answer to question 2 logically follows as affirmative.

This Court has never in any case, laid out or said that it should lay out a detailed listing of facts, like a logarithm table, as petitioners seek, from which a clerk, or labor representative, or personnel man, or an IBM machine could check or insert the facts in question and receive a detailed and exact answer from the table. Instead, it has considered its function to be to lay out broad guidelines from which local courts by "litigating elucidation" will decide detailed issues; this Court deals only with "classes of situations", San Diego v. Garmon, 359 U.S. 236, 241, 242. It will only interfere with a subordinate body when

the exercise of state power threatens interference with a "clearly indicated policy of industrial relations", but will not interfere where an activity is "a merely peripheral concern" of the LMR Act, page 243, San Diego, citing Gonzales; post.

The latest pronouncement of this Court, on the preemption question, known to respondent, is Linn v. United, 86 S. Ct. 657, February 21, 1966.

Here, it was held that the National Labor Relations Board did not have exclusive jurisdiction of a libel suit based upon defamation of a Company Manager, by a Union, during a labor campaign. *Malice*, of course, was charged and was important in the decision (and this is true in the Owens case). Federal jurisdiction was based upon diversity.

A facet, important in the present climate, was that the National Labor Relations Board could not give complete relief (e.g. damages, penalty-punitive damages, etc.), but the State Court could do so. The argument (a twin to that advanced herein) that huge, dire and disastrous sequelae would flow from State jurisdiction was rejected by the Court. And the opinion reiterated that States need not yield jurisdiction where the matter is a "merely peripheral concern of LMRA", p. 661, citing Garmon, supra, and quoting Garner, post; and it quotes LaBurnum, post, approvingly, to the effect that State procedures survive if they are not in conflict with federal. The opinion likewise approves the pronouncement in Russell, post, which upheld State jurisdiction in an action for compensation and punitive damages for malicious interference with a lawful occupation, page 663.

The Supreme Court of Missouri properly leaned heavily, in the decision, upon Gonzales, 356 U.S. 617, and Russell, 356 U.S. 634. Respondent, to save the Court duplicate reading, will not repeat those studied comments.

There is much more, in the law, in fact. Respondent's two briefs to the Kansas City Court of Appeals, to which respondent hopes this Court will refer, discuss a number of cases in more detail than is practicable here. Among these are cases from the Supreme Court of Missouri, from subordinate federal courts, from the National Labor Relations Board, and from fifteen State Courts, affirming jurisdiction in State Courts, in situations similar to the instant one. This is the process of "litigating elucidation" of the details involved in various facets of the broad guidelines already provided by this Court.

In International v. Gonzales, 356 U.S. 617 (1957), this Court said that the "protection of Union members in their contractual rights as members from arbitrary conduct by Unions and Union officers has not been undertaken by Federal law, and indeed, the assertion of any such power, has been expressly denied" (page 620, emphasis added). This Court held that this was so, even though an unfair labor practice might be involved and even though the National Labor Relations Board could also award damages. It added, page 621, that "a State remedy for breach of contract also ought not be displaced by such evidentiary coincidence (between the breach and a NLRB complaint) * * *" (emphasis supplied). The subject matter of Gonzales dealt with arbitrariness and misconduct of the Union against its member, page 622. This Court said: "the State Court proceedings deal with arbitrariness and misconduct vis-a-vis the individual Union Members and the Union; the Board proceeding, looking principally to

the nexus between Union Action and employer discrimination examines the ouster from membership in entirely different terms." (pages 622, 623; emphasis added). No such nexus was pleaded, proved or submitted in the present case.

This Court has never narrowed or rejected the above guidelines and they are the law today. In fact, you have several times referred to the Gonzales case approvingly. The Owens case is well within the limits of that yard-stick.

The opinion in International v. Russell, 356 U.S. 634, reminded us that even though the NLRB could award backpay, it could not grant punitive damages, and that, notwithstanding that an unfair labor practice might be involved, the State jurisdiction to award actual and punitive damages as to tortious conduct of a labor union was not pre-empted from an Alabama Court.

Thereafter, in the case of Dowd v. Courtney, 368 U.S. 502, this Body reiterated principles enunciated by Mr. Justice Frankfurter in Gonzales when it held that the Labor Management Relations Act does not divest' State Courts of jurisdiction for violation of bargaining contracts. This Court emphasized the basis of this country's juridical foundation when it quoted, with approval, the Massachusetts Supreme Judicial Court, as follows: "In the absence of a clear holding by the Supreme Court of . the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own Courts" (emphasis added). In the opinion, the Dowd case significantly stated, p. 507: "exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." No

such "clear holding" has been made, but rather, the reverse, in Gonzales, as to arbitrariness and misconduct—the situation in the Owens case. The Dowd case further emphasized that a remedy for breach of a bargaining contract lies only in the Courts.

Hard on the heels of Dowd, came Local 174 v. Lucas, 369 U.S. 95, two weeks later, on March 5, 1962, with a similar holding, citing Dowd. It guaranteed uniformity of holdings in the State courts, additionally, by announcing the requirement that federal law would apply in the State Court hearings (cf. FELA cases).

Humphrey v. Moore, 375 U.S. 335 (January 6, 1964), also approved and cited doctrine in the Dowd case. It was originated in an action in the Kentucky State Court to enforce a collective bargaining contract, p. 341. This Court held that federal law is to be applied in the State Court and that the procedure was not pre-empted, adding that the Union admitted that even though employees were attempting to "maintain suits against their representatives, when the latter hostilely discriminated against them" (citing Ford v. Huffman, 345 U.S. 330), jurisdiction was not pre-empted by the NLRB, p. 344. This Court held that State court jurisdiction was not withdrawn in an action for breach of a bargaining contract. (the Owens case charges this).

Smith v. Evening News, 371 U.S. 195, October 10, 1962, had been announced more than a year before the Humphrey case. It was an opinion also concerned with breach of a bargaining contract; an employee sued his employer in a Michigan State Court. This Court cited Dowd, supra, as refusing to apply the pre-emption doctrine, and adopted the same course, even though the facts concededly involved an unfair labor practice and discrimination, and though

it was urged that the wrongful conduct was arguably under NLRA. This Court held that authority under Sec. 301 is not necessarily exclusive, stating, page 198, footnote 6, that the National Labor Relations Board agrees; it was declared that should any conflicts occur, they will be dealt with then.

In late January of last year, in Republic v. Maddox, 379 U.S. 650, this Court reversed because of the failure of an employee, suing his employer in the Alabama State Courts, first to exhaust his administrative remedies. In connection with the question of pre-emption of remedies, however, it renewed the earlier criteria for pre-emption, enumerating such matters, page 657, footnote 14, as the scope of possible review from monetary awards, and "the ability of the Board to give the same remedies as could be obtained by Court suit" (emphasis added). (Owens could not get punitive damages before the NLRB).

Earlier cases had laid the ground-work for these clear guidelines, for fair representation standards—utilized by the Supreme Court of Missouri in the instant case—internal union action, breach of contract, arbitrariness and misconduct, Gonzales, supra, and malice, Linn, supra, which petitioner imaginatively dubs, p. 11, as productive of "conflict and confusion."

TWA v. Koppal, 345 U.S. 653, June 1, 1953, was an action based jurisdiction-wise upon diversity. While the employee was denied relief by reason of failure to exhaust his administrative remedies (which Owens was trying to do), this Court recognized that a discharged employee of a carrier may resort to a State recognized cause of action for wrongful discharge, even though the matter could come under the Railway Labor Act, pp. 660, 661.

This was followed by the "old faithful" of pre-emption learning—United v. LaBurnum, 347 U.S. 656, June 7, 1954 (cited approvingly in Linn, supra). Here, a case, originating in a State Court in Virginia, resulted in a jury verdict for a corporation against three unions, for actual and punitive damages. Jurisdiction of the State court was upheld, even though the act complained of constituted also an unfair labor practice under Sec. 8, LMRA. A strike had been threatened if employees did not join a union. The action was laid in tort for damages.

In LaBurnum, it was declared that only conflicting state procedures were excluded and held, p. 663: "Here Congress has neither provided nor suggested any substitution for the traditional State Court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so wilf, in effect, grant petitioners immunity from liability for their tortious conduct." (emphasis added).

The Pennsylvania Court of Common Pleas, in Chiappazzi v. Machinists, 48 Labor Cases, Sec. 50949, page 6387, followed these guidelines under facts which almost exactly parallel the instant ones (except they lack the strong evidence of arbitrariness and malice of the Union officers in the breach of contract in the Owens matter). The Court held that it had jurisdiction in this action for breach of contractual obligation, against a Union to act properly, in good faith, under the Union Agreement, to process an employee's grievance by presenting it to NLRB.

The following additional favorable cases, to similar effect, will be cited, but not discussed; they are presented in this respondent's briefs filed in the State Courts:

Giba v. International, 205 F. Supp. 553, 556 (1962); Grumwald-Marx v. Los Angeles, 343 P.2d 23, 32 (Cal. 1959); Narens v. Campbell, 347 S.W.2d 204 (Mo. Sup.); State v. Local, 317 S.W.2d 309, 321 (Mo. Sup. banc); Bailer v. Local, 161 A.2d 343 (Penn.); Mahoney v. Sailors, 275 P.2d 440, cert. den. (Wash.); McCarroll v. L. A. Council, 315 P.2d 322, cert. den. (Cal. 1957); NLRB v. Local 294, Teamsters, 317 F.2d 746 (C.A. N.Y. 1963); International v. Superior, 296 P.2d 395 (Cal.); Denver v. Shore, 287 P.2d 267 (Colo.); NLRB v. Miranda, 326 F.2d 172 (C.A. 2, N.Y., 1963, referred to by petitioner here) and stating p. 180: "The machinery of the Board and the remedies applied in the enforcement of unfair labor practices, as defined in the Act, are not suited to the task of deciding general questions of private wrongs"—(emphasis added); NLRB v. Local, 317 F.2d 746; Gilbert v. Hoisting Local, 384 P.2d 136, cert. den. (Ore. 1963); NLRB v. Murray, 326 F.2d 509 (C.A. 6, Tenn. 1964); International v. Shawnee, 224 F. Supp. 347 (U.S. D.C. Okla. 1963); NLRB v. Symons, 328 F.2d 835 (C.A. 7, III. 1964); Fingar v. Seaboard, 277 F.2d 698 (C.A. 5); Radio v. Local 780, 48 Labor Cases (L. C.), Sec. 18716 (Fla. Dist. Ct. of Appeals, 160 So.2d 150); Humphrey v. Thyer, 48 Labor Cases, Sec. 50947 (U.S. D.C. Miss. 1963); Tecumseh v. WERB, 49 L. C. 51043 (3/6/64 Wisc.); Guzzo v. Steelworkers, 47 LRRM 2379 (Cal. Superior).

AS TO CASES CITED BY PETITIONERS

Petitioners cite, as assertedly helpful to them, a number of cases. In those mentioned hereafter, however, support for respondent's position appears, as there set forth, or the cases are distinguishable readily:

Humphrey v. Moore, 375 U.S. 335. This Court held, note 6, p. 344, as to a claim that the State Court was without jurisdiction of a suit to enjoin dovetailing seniority in a

merger: "Since in our view the complaint here charged a breach of contract, we find no merit in this position" (emphasis added).

Steele v. L & N, 323 U.S. 192, cert. to Ala. Sup. Courts have jurisdiction and a duty to afford a remedy for damages for breach of a statutory duty by a Union to represent its members fairly, impartially, and in good faith, without hostile discrimination. Remanded to State Court to proceed with the case.

Ford v. Huffman, 345 U.S. 330. An employee's representative must act in "complete good faith and honesty of purpose."

San Diego v. Garmon, 359 U.S. 236(4/20/59), cert. to Sup. Ct. Cal. This Court deals only "with classes of situations", p. 242, and p. 243; it only interferes with a state court when the exercise of its power threatens interference with a "clearly indicated policy of industrial relations," and not where the activity was a "merely peripheral concern of LMRA."

International v. O'Brien, 339 U.S. 454, State legislation in the field of LMRA is proper, unless it conflicts with federal law.

Knox v. International, 223 F. Supp. 1009, bases its decision on the NLRB Miranda decision, which was reversed by the Court of Appeals. The case was based upon discrimination by a Union.

Stout v. Construction, 226 F. Supp. 673, involved race discrimination.

Cosmark v. Struthers, 194 A.2d 325 (Penn.), p. 328, excepts internal Union matters from those it views as preempted.

Webster v. Midland, 193 N.E.2d 212 (Ill.), involved and was decided upon an exhaustion of remedies failure; its obiter concerning pre-emption was so much of an "in addition" that it was not even headnoted.

Young v. United, 216 A.2d 500. No breach of contract alleged.

Hiller v. Liquor Union, 338 F.2d 778 (C.A. 2). Held Union liable in court action for denial of right of fair representation.

Freedman v. National, 347 F.2d 167 (C.A. 2, 1965). Seaman sued Union for refusal to process grievance; jurisdiction supported, citing Humphrey v. Moore.

Wheatley v. International, 387 P.2d 555, Utah, involved a suit by a member against a Union for negligent failure to represent him properly; since he conceded discharge for good cause, the Court dismissed the case on the merits—but not for jurisdictional reasons.

In Moore v. Illinois Central, 312 U.S. 630, 3/31/41, with jurisdiction based upon diversity, this Court held that the right of an employee to sue for wrongful discharge in a State Court did not depend upon exhaustion of remedies. And it was stated by this Court January 25, 1965, that the Moore v. Illinois case was not overruled (p. 657, fn. 14) by the opinion in Republic v. Maddox, 379 U.S. 650.

Donnelly v. United, 190 A.2d 825, Sup. N.J. 5/6/63, is another example of a State court properly working out the details of implementation of this Court's clear guidelines. The court held that a member could sue a Union for failure to process a claim of unlawful discharge under the grievance procedure, for breach of contract, where the Union acted arbitrarily in bad faith in refusing to demand arbitration; that the facts would be tested by federal law, citing

Smith v. Evening News, supra; that the States have concurrent authority in such instances (federal law being utilized), citing the Dowd case, supra; and that a guideline is that the Union must exercise the utmost good faith toward all employees, in earrying out the bargaining agreement.

The above case was followed in New Jersey, in Independent v. Socony, 197 A.2d 25, 32, and 205 A.2d 79, with holdings that the State Court, within the guidelines of the federal law had jurisdiction to hear labor actions, even though an unfair labor practice also appeared under Sec. 301, 29 U.S.C.A. 158, and 185.

Petitioners cite Cortez v. Ford, 84 N.W.2d 523, Sup. Mich. Here, a female member sued her Union and employer for a lay-off conspiracy to prefer males. It was held that the discretion of the Union could be challenged for bad faith, arbitrary action or fraud, and that the members may sue to enforce proper representation and the duty of fair representation under NLRA, Sec. 8, 29 U.S.C.A., Sec. 158.

In Brandt v. U. S. Lines, 246 F. Supp. 982, U.S. D.C. N.Y. 1/28/64, a member sued the employer and the Union to compel arbitration of his discharge. Again, the court referred to the guidelines of fair representation, measured by lack of arbitrariness, complete good faith and honesty of purpose in the exercise of the Union's sifting discretion, and other acts of representation.

These principles were stated in another case cited by petitioners, Stewart v. Day, 294 F.2d 7 (C.A. 5), the court citing this court in Ford v. Huffman.

Local 100, United v. Borden, 373 U.S. 690 and Local 207, International v. Perko, 373 U.S. 701, cited by petitioners, were fully differentiated from the instant case, in the opin-

ion of the Supreme Court of Missouri, pp. 45-47 of petitioners' Appendix. The short answer to them both is that they involve and were founded upon discrimination by unfair labor practices. Nowhere does this appear, top, side, or bottom, in the pleading, evidence or submission in the Owens (Sipes) case. On page 31 of petitioners' brief to the Kansas City Court of Appeals (quoted on page 9 of our red-covered Reply Brief in that court—forwarded herewith), petitioners admit: "There was no showing by Plaintiff that he was singled out for special discriminatory treatment by the Union,"

The present case also involves an internal Union matter (as Gonzales, supra, and the Supreme Court of Missouri stress); petitioners confessed this below, when they stated in their Brief to the Kansas City Court of Appeals, page 32 (quoted on page 8 of our red-covered Reply Brief in that court—forwarded herewith) that the grievance procedure was an "internal and contractual" remedy. And, in addition to their acceptance of this verity, their officer and witness admitted the same thing in his testimony (see Respondent's Statement Supplemental to Petitioners').

CONCLUSION

Thus, in respondent's view, from the days of Gonzales, and earlier, this Court has given a yardstick and guidelines for the lower courts to follow, in the process of "litigating elucidation" of the details. They have followed such benchmarks in numbers of cases cited over the intervening years. No such cloudiness, confusion, "chaos", disaster, and destructions of our labor-management complex is apparent to anyone. It is perfectly proper, and in character, for this Court not to do the pick and shovel work, but to leave that for subordinate Courts, subject to your architectural plans.

This, the Supreme Court of Missouri has done, as have many other courts.

If petitioners wish to change, or particularize, the triedand-true guidelines, it would seem that they have chosen
a poor vehicle here, because the facts of the "outrageous" demand for \$300.00, the arbitrary refusal by the
officers to follow the decision of the Executive Board to
go to arbitration, the clandestine dismissal of Owens'
grievance in the 4th Step after arguing its merit, the admission by petitioners' Kobett that the Union might "twist"
facts around, the confessions by petitioners' counsel that
the facts showed an internal Union matter and no discriminatory treatment of Owens, the arbitrariness, lack of
just cause, and legal malice found by the Supreme Court
of Missouri in this internal breach of contract action,
egregiously point up the wrongdoing as within the Gonzales
guidelines set and maintained by this Court.

That these yardsticks for preserving the ancient premises of this Nation for retention of non-conflicting State jurisdiction are sound is emphasized in the quoted philosophy of one of the Justices of this Court, shortly before entry upon his duties here:

"As the explosion of federal legislation and judicial decision affects more and more of the particulars and details of our life, we approach, I think, ever more closely to the limits of the effective capability of central government—of the Congress, the presidency and the federal agencies * * * I am impressed by the possibility that there are limits to the vitality and effectiveness which we can secure through wholly or predominately federal machinery".

This case is one of detailed implementation of your declared principles, properly solved by the State Court, and not of the importance or type of which this Court has taken cognizance.

Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENT.

Owens' employer has served upon Respondent an Amicus Curiae Brief.

The authors of this work admit that their client has no present or future financial exposure to Owens or his successor. Furthermore, although Respondent furnished them a copy of Petitioners' Brief, they have added nothing but predictions of calamitous events to petitioners' woeful forecasts along the same lines (which, strangely enough, have failed to materialize in the nine years since the Gonzales guidelines were set!) In short, in a rather unusual briefing partnership, their effort is patently to add the mere weight of numbers to the petitioners' arguments, the result to be that this small State case may be viewed in the perspective (completely distorted) of a world-shaking challenge to the Nation's labor-management relations as they exist today.

The one case cited which is not included in petitioners' Brief is Black-Clawson v. International, 313 F.2d 179 (1962, C.A. 2). This case held that an employee, as an individual, could not pursue his grievance through arbitration (emphasizing all the more that Owens needs protection of the courts against internal arbitrary and malicious breaches of a Union's fiduciary duty to its members of proper representation, under the bargaining agreement). The Court quoted from the District Court opinion in Ostrofsky, 171 F. Supp. 790; it is noted that the Ostrofsky opinion continues that an action may be filed by an employee "if the Union acted unfairly towards the employee in refusing to press the employee's claim through to, and including arbitration under the collective bargaining agreement", p. 791 (emphasis added).

CONCLUSION

It thus appears that the "scare headlines" feature of this Brief also are not based upon any substantial past experience or reasonable expectation for the future.

SECOND SUPPLEMENT

A preliminary typing of a second Amicus Curiae offering (by AFL-CIO) has just been received.

This too is a composite of gloomy forebodings as to the effect which the Missouri Court's interpretation would have upon the current labor scene. However, the facts set out in the opinion disclose arbitrary, unjust and malicious actions within the nine year old guidelines of Gonzales, where the backdrop is an "outrageous" demand for \$300.00, overruling of the solemn vote by the Executive. Board to go to arbitration, an officer of petitioners admitting "twisting" the facts, a case for arbitration with evidence top-heavy in Owens' favor (six doctors for him against two, opposed), and petitioners clandestinely withdrawing Owens' case after the Step Four hearing (a month before trial) notwithstanding a previously affirmative assertion that it was meritorious all along the line. The Brief buttresses itself with nothing but self-serving out-of-the record statements, references to articles in law school publications, and a report of a speech-none of which are either in this record, or admissible in the record of any court of law. Only one legal authority is presented, which petitioners have not cited: Simmons v. Union News, 15 L. Ed. 2d 125, 60 LRRM 2255 (10/18/65) (pet. for cert. to CADC den., Douglas dissenting in opinion). The action in this case substantiates Respondent's contention that this Court is leaving to the proper bodies, the lower courts, the details of measuring, with this Court's yardstick, each set of facts as it appears in each particular case—"litigating elucidation". Certiorari likewise should be demed in the instant case.

In the figures cited in this Brief, it is certainly reasonable to assume that those dropped (percentage of the whole not stated) were not dropped under the tyrannical circumstances in evidence here; if they were, absence of a juridical remedy (a void which petitioners seek to create) with its punitive power to lash such wrongdoersand to deter such potential tyrants-would serve to warm the nest for procreation of future despotically inclined representatives of the Union members. It is not without significance, in this connection, that in the two jury cases* tried by counsel for respondent, involving arbitrary and otherwise wrongful conduct of such officials, juries composed of predominately Union members believing that such action should be checked by courts, have voted Plaintiff the full amount in each instance. As to the bland suggestion by this Brief that a better remedy would be merely to reinstate the employee and give him back, pay, this would serve merely to pardon egregious offenders -as in the present case-by eliminating the punitive features of a Court Action. Furthermore, as the "law's delays" wear on, the employee may, through the mental and physical stress of being long jobless, and for other reasons-become incapacitated for reinstatement. Thus, such a "remedy" would be sterile.

^{*}This case and Morris v. Brotherhood, 338 S.W.2d 777, Mo. Sup.

Here again, from the lack of proper substance in this Amicus Curiae Brief, one must once more conclude that its filing occurred principally in the interest of adding a group of snowflakes to the two now resting upon respondent's bough, in the fond hope that the weight of numbers will bear down the inherent strength of Respondent's upright posture.

Respectfully submitted,

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IN THE

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Supreme Court of the Uniten Sententen

October Term, 1966

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT,
Petitioners

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Per Cases
OPINIONS BELOW 1
JURISDICTION 188 E. VI. Serious V. opto I leaders A. QUESTIONS PRESENTED OCT. 2001
CONSTITUTIONAL AND STATUTORY PROVISIONS IN-
STATEMENT OF THE CASE
SUMMARY OF ARGUMENT
ARGUMENT AS Josephil. v. negotody bearing. in bookinder 17
I—THE PROCESSING OF GRIEVANCES UNDER A COLLECTIVE BARGAINING AGREEMENT IS AN INTEGRAL PART OF THE COLLECTIVE BAR- GAINING PROCESS
II—THE NATURE AND SCOPE OF A UNION'S OBLI- GATION TO INDIVIDUAL EMPLOYERS IN THE HANDLING OF THEIR GRIEVANCES MUST BE DETERMINED AS AN ASPECT OF THE UNION'S DUTY OF FAIR REPRESENTATION
(a) The National Labor Relations Act
(b) Section 301 of the Labor Management Relations Act 27
ITI—THE UNION IN THIS CASE DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION 82
IV—SINCE THE NATIONAL LABOR RELATIONS BOARD HAS HELD THAT VIOLATION OF THE DUTY OF FAIR REPRESENTATION IS AN UN- FAIR LABOR PRACTICE, THE COURTS ARE PRE- CLUDED FROM ENTERTAINING SUITS TO REM- EDY SUCH VIOLATIONS
V—AN AWARD OF DAMAGES IS NOT IN ANY EVENT THE APPROPRIATE REMEDY FOR A UNIONS IMPROPER REFUSAL TO TAKE A GRIEVANCE TO ARBITRATION
CONCLUSION
Constitutional and Statutory Provisions Involved 53

TABLE OF CITATIONS

Cases

Acronautical Lodge v. Campbell, 337 U.S. 521 (1949)
Berman v. National Maritime Union 166 P Sum 207 /C D avan
and the state of t
Black Clawson Co. v. International As n of Machinists, 313 F.2d 179 (2d Cir. 1962)
Brandt v. United States Lines, 246 P. Supp. 982 (S.D.N.Y. o 1964)
(1952) Railroad Trainmen vo Howard, 343 U.S. 768
Cargo Handlers, Inc., 159 N.L.R.B. No. 17 (June 17, 1966)
Central Georgia Ry. v. Jones, 242 F.2d 230 (5th Cir. 1956), cert. denied, 352 U.S. 848 (1956)
Charles Dowd Blar Co. s. Courtney, 368 (J.S. 502 (1962)
Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963) 26, 37
Elgin, J. & R. Ry. Co. v. Burley, 325 U.S. 711 (1945) 327 U.S.
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 24-25, 30, 34, 40
Garner v. Teamsters Local 776, 346 U.S. 485 (1953)
Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232
Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.
10 10 10 10 10 10 10 10 10 10 10 10 10 1
Humphrey v. Moore, 375 U.S. 335 (1964)
12 O.S. 67 (1905)
N.L. R. 1573 (1964) Workers Union (Hughes Tool Co.), 147
THE CONTROL OF THE CONTROL OF THE PROPERTY OF
(1950) Awn of Machinists v. Gonzales, 356 U.S. 617
International Union, United Automobile Working 140 M.T.D.D.
482 (1964)
Constitutional and Statutory Provisions Involved

Jenkins v. Schluderberg-Kurdle Co., 217 Md. 556, 144 A.2d 280 (1958)
J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944)
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966)
Local 1367, International Longshoremen's As'n, 148 N.L.R.B. 897
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 2
Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964) . 42, 44
Machinists v. Central Airlines, 372 U.S. 682 (1963)
Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963)
Moore v. Illinois Central R. Co., 312 U.S. 630 (1941)47
Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio, 1954), reversed, 229 F.2d 396 (6th Cir. 1956)
N.L.R.B. v. Driven Local 639, 362 U.S. 274 (1960) h. and hopper 43
Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), affirmed 273 F.2d 614 (4th Cir. 1960), cert. denied, 863 U.S.
Palnau v. Detroit Edison Co., 301 F.2d 702 (6th Cir. 1962)
Republic Steel v. Maddox, 379 U.S. 650 (1965) 15, 29, 46-47, 48
Richardson v. Texas & New Orleans R. Co., 242 F.2d 230 (5th Cir. 1957)
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)
Slocum v. Delaware, L & W. R. Co., 339 U.S. 239 (1950) 47
Smith v. Evening News, 371 U.S. 195 (1962)
Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)
Stewart V. Day & Zimmerman, Inc., 294 F.2d 7 (5th Chr. 1961)
100 (100 to 100
Syres v. Oil Workers International Union, 350 U.S. 892 (1955) of Acres 1955 P.2d 739 (5th Cir. 1955)
8 (ET. Fried (1957) W. S. S. S. Hill Miller Month of the State of the Labor Arbitration and Industrial Change, Proceedings of the

Page
Trotter v. Amalgamated Ass'n of Street Ry. Employees, 309 F.2d 564 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963) 40.
Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210. (1944)
United Automobile Workers v. Russell, 356 U.S. 634 (1958) 44
United Constr. Workers v. Laburnum Corp., 347 U.S. 656 (1954) 44
United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956) 49
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 48
United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 1960)
20 10 20 10
Articles
Alexander, "Impartial Umpireships" in Arbitration and the Law, Proceedings of the Twelfth Annual Meeting, National Academy
of Arbitrators (BNA, 1959), p. 146
Chamberlain, Labor (1958)
Comment, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L. J. 1215 (1964)
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Clox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956)
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Fuller, Collective Bargaining and the Arbitrator, in Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators (#CDA, 1962), p. 49
Mangann, Resilement Griswance Procedures, 15 Industrial and Labor Relations Review (1962), 474
Bres, "Distremed Grievance Procedures and Their Rehabilitation,"

Per	ege.
Sixteenth Annual Meeting, National Academy of Arbitrators (BNA, 1963), p. 104	37
Ross, "The Role of the Law in Arbitration: A Panel Discussion," in Arbitration and the Law, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators (BNA, 1959), p 72	
(BNA, 1959), p. 72	20
Summers, Individual Rights in Collective Agreements and Arbitra-	· Coo
tration, 37 N.Y.U.L. Rev. 362 (1962)	26
Miscellaneous	
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42	27
and the state of t	n
Statutes & Constitutional Provisions	
National Labor Relations Act	
§ 7, 29 US.C. § 157	41
\$ 8(b) (1) (A), U.S.C. \$ 158(b) (1) (A)	42
§ 8(b) (2), US.C. § 158(b) (2)	42
§ 8(b(3), US.C. § 158(b) (3)	42
§ 8(d), US.C. § 158(d)	27
§ 9(a), US.C. § 159(a)	26
§ 9(a), US.C. § 159(a)	2
Labor Management Relations Act	
§ 203(d), 29 U.S.C. § 173(d)	36
§ 301, 29 U.S.C. § 185	
§ 303, 29 U.S.C. § 187	45
United States Constitution	
Article I, Section 8	
Article VI	2

Supreme Court of the United States

October Term, 1966

Licentia A No. 114 bridge no

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT,
Petitioners

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Circuit Court of Jackson County issued no opinion. Its order is printed in the record at page 171. The opinion of the Kansas City Court of Appeals, which is unreported, is set forth at R. 193-201. The opinion of the Supreme Court of Missouri en banc is reported at 397 S.W.2d 658.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 13, 1965 (R. 204). A timely petition for rehearing was filed on December 28, 1965 and was denied on January 10, 1966 (R. 218). On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966 (R. 219). The petition was filed on April 29, 1966 and granted on June 6,

1966 (R. 220). This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

When a union subject to the National Labor Relations. Act processed an employee's grievance under a collective bargaining agreement but refused to take it to arbitration because it believed in good faith that it lacked merit:

1. Can the grievant's claim that the union violated its duty of fair representation be adjudicated and remedied in a suit for damages against the union, or does exclusive jurisdiction over such a claim lie with the National Labor Relations Board?

2. If the Board does not have exclusive jurisdiction, does federal law authorize the court or jury to award damages against the union in the absence of any evidence of bad faith or discriminatory motive and solely on the basis of testimony going to the merits of the grievance?

3. Is the proper relief in such a suit an award of damages based on the assumption that the grievance would have been sustained if taken to arbitration, or should the court be limited to entering an order requiring the grievance to be arbitrated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, Section 8, and Article VI of the Constitution of the United States; Sections 7, 8(b), 8(d), 9(a), and 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158, 159 and 160; and Section 301(a) of the Labor-Management Relations Act, 1947, 20 U.S.C. § 185. The pertinent provisions thereof are set forth in full in the Appendix to this petition.

STATEMENT OF THE CASE

This is a class suit originally brought by Benjamin Owens, Jr. in the Circuit Court of Jackson County, Missouri, against the members of the United Brotherhood of Packinghouse Workers and its Local 12 (hereinafter referred to jointly as "the union").

Petitioners Vaca, Mooney and Kobett, officers of the Brotherhood and the Local, were named defendants as rep-

resentatives of the union's membership (R. 1-2).

The petition for damages alleged that the union was the plaintiff's agent under a collective bargaining agreement with Swift and Company, that the plaintiff had been discharged in violation of that agreement, that he had filed a grievance protesting the discharge and had requested the union to process that grievance to arbitration but that the union had refused to do so and had demanded the payment of \$300. By so doing, the petition alleged, the union had "wrongfully, illegally, wantonly, arbitrarily, and with legal malice" prevented plaintiff from exhausting his remedies under the contract, causing him actual damages in the amount of \$6,500. The petition prayed for actual damages against the class in the sum of \$7,000 and punitive damages of \$3,000. (R. 4).

The answer denied the allegations and, in addition, raised the following defenses: (1) that jurisdiction over the subject matter of the action was exclusively with the National Labor Relations Board, which pre-empted the jurisdiction of the courts, (2) that the petition had failed to state a cause of action, and (3) that the petition had not sufficiently alleged that the defendants had exercised bad faith in refusing to process the grievance (R. 5-6).

The case came on for trial before a jury in June, 1964.

Most of the testimony was uncontroverted. Owens had worked for Swift and Company as a laborer and as a trimmer since 1946. His job involved the performance of heavy labor and the cutting of meat in a refrigerated room (R.

76-77). He was sometimes required to lift and carry (with a helper) sides of beef weighing as much as 900 pounds each (R. 11), and chucks weighing up to 75 pounds (R. 14).

Owens suffered from a congenital heart condition and high blood pressure, and had been under treatment at the University of Kansas Medical Center off and on since 1956 (R. 60, 75). In May, 1959, Owens, in his own words, "was feeling awfully bad," was "exhausted," and "didn't see any sense in going on killing" himself (R. 71). He decided to leave work in order to rest up (R. 15). The collective bargaining agreement provided for ickness and accident benefits on certification by a physician of physical inability to work (R. 176) and the company physician, a Dr. Saper, gave Owens permission to take sick leave and draw those benefits (R. 37). His own doctor, a Dr. Alexander, then put him in the hospital, where he remained for a week (R. 38).

At the end of August 1959, Dr. Alexander gave Owens a certificate saying that he was physically able to return to his job (R. 16, 39). But when Owens reported to the plant, Dr. Saper took his blood pressure and refused to allow him to work. Indeed, Dr. Saper advised Owens to get back in bed as fast as he could and to stay there (R. 21, 73). Owens continued to draw sick leave until December 18, 1959. He then went to a Dr. Steinzig, who treated him for three weeks and then also gave him a certificate that he was able to work (R. 21). This time, however, Owens presented his certificate to a company nurse who, unaware of his history, sent him back to work. He worked three days—January 6, 7 and 8, 1960—until the medical department of the company discovered he had come back to work and told his superintendent to send him home. (R. 21-23, 192)

Owens then, in early January, 1960, filed a grievance under the collective bargaining agreement. The agreement provided a typical five step grievance procedure, providing

for discussions at ascending levels of company and union responsibility and terminating, at the fifth step, with arbitration before a named permanent arbitrator (R. 174-176). While the grievance was pending, Owens, at the union's request, went to a number of doctors who gave him certificates either showing his blood pressure at the time of the examination or stating that he was able to work (R. 18, 46). Owens did not inform any of these doctors that he had a history of heart trouble (R. 158).

The union processed the grievance through the second, third and fourth steps of the grievance procedure. In these steps the union, relying on the certificates which Owens had obtained at its request, took the position that Owens was able to work, and that in the event he was not able to do his regular job he should be provided with light work. (R. 186, 188, 190). The company said that it had no light work available to which Owens' seniority would entitle him and that, on the basis of its medical records, Owens' return to his regular job would be hazardous to his life. (R. 110).

In the fourth-step meeting, in which the national union participated, the company told Owens and the union's representatives that in the face of their own doctor's opinion and the report of Owen's treatment at the University of Kansas Hospital going back to 1956, they could not reinstate Owens simply on the basis of certificates that he was able to work or simple blood pressure readings, but would require the report of a complete physical examination (R. 105-6, 124, 136, 145). They then discussed rehabilitation. The company proposed to Owens that he seek help from the heart association in learning a new trade involving lighter, work. The company also promised to help him qualify for social security (R. 65). Owens asked time to think it over and, at the union's request, the grievance was simply "held" at the fourth step (R. 124, 190).

A few weeks later Owens, who had hired a lawyer (R.

61), decided that he was not interested in rehabilitation and refused to go to the heart association (R. 65). He asked the union to take the case to arbitration (R. 69). The executive board of the Local, which had the authority to recommend arbitration, met to consider the case. It decided to send Owens to any doctor of his own choosing at union expense, in an attempt to get some better medical evidence. (R. 107, \$25). Owens went to Dr. Hesser—one of the doctors who had given him a certificate—to get, in his words, "a real examination." Dr. Hesser said that, as a surgeon, he was not able to conduct such an examination. He recommended a heart specialist, Dr. Day (R. 57, 155).

On February 6, 1961, Dr. Day examined Owens and concluded that Owens was a very sick man indeed (R. 90). According to his written seport, Owens' blood pressure was 260/120 or higher (this was the upper limit of the doctor's apparatus). His electrocardiogram showed some heart damage. He had moderate kindney damage. In sum, according to Dr. Day, "Owens is not able to work and the legal problems of Workmen's Compensation would prohibit any company from hiring him. I believe he is entitled to social security disability and I would sign such a paper." (R. 187-8):

In light of this report, the local executive board decided not to appeal the case to arbitration but to keep it in a 'hold' status (R. 109, 126) in the hope that something would develop that would justify a further attempt to get Owens back to work. (R. 149).

In February, 1962, Owens filed this suit. Two years later, on May 8, 1964, the grievance was withdrawn at a meeting

To qualify for disability benefits under social security, a person must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long continued and indefinite duration." 42 U.S.C. 1423(a) (2)

with the company at which pending grievances were reviewed. (R. 138)

All of the above was substantially undisputed at the trial. There were a few disputed issues. The first of these concerned the \$300 which the complaint alleged the union had demanded. Owens testified that Manuel Vaca, the Local Union President, told him that the case couldn't be won, that the Local would not take it to arbitration because it had no money, but that if Owens would pay Vaca \$300 toward the cost of an arbitrator, something might be done. (R. 30, 79-82). Vaca denied ever having asked for \$300, or any sum, and testified that he had no power to decide whether the case would go to arbitration. (R. 126). Although, in the light of other testimony, Vaca's testimony seems the more credible, we will here assume that the jury found Owens' testimony to be true, i.e., that Vaca did offer to take the case to arbitration, although he said it could not be won, if Owens would pay the costs.

The other issue in dispute related to the actual fact of Owens' physical condition. Although he introduced no

Owens testified that after he had refused to give Vaca \$300 he went to Jamerson and offered Jamerson the \$300 "because I trust you more than I will Mr. Vaca." (R. 154). According to Owens, Jamerson refused the money.

Jamerson, who supported Owens throughout, had a somewhat different version. He denied that Owens had referred to any request by Vaca for money. The \$300 came up in their conversation, he testified, when Owens volunteered to give him \$300 if he could win the case. It is also clear that under the agreement only the National Union could request arbitration (R. 176), and that it would do so only if the local union executive board rather than Vaca, so decided. (R. 96, 103, 127, 140).

The \$300 also figured in the testimony of Leonard Jamerson, an employee of Swift and Company, who handled Owens' grievance in the lower steps of the grievance procedure. Jamerson regarded himself as Owens' representative (R. 95). He felt that Owens was right and, in fact, made a motion before the Executive Board to take the case to arbitration because, as he put it, "I can't just sit here and tell how people are, healthy or anything like that." (R. 98).

medical testimony, Owens' attorney sought to show at the trial that Owens was physically fit. He did this through testimony as to the heavy work Owens had done, on a casual basis, since he left Swift (R. 7-10, 31-36, 78), the baseball games Owens had played (R. 74), and Owens' own statements as to his physical condition (R. 15, 73). Some of this testimony was objected to on the ground that the issue to be tried was not whether Owens was physically fit but whether the union had acted in good faith on the basis of the information available to it. The objection was overruled (R. 74).

The defendants, consistent with their view of the issue to be tried, introduced no testimony, medical or otherwise, on the issue of Owens' health but sought, on cross-examination, to minimize the weight of plaintiff's testimony. Since the jury found for plaintiff, we assume that they found Owens to be physically fit and his discharge by Swift therefore to have been wrongful.

After the close of plaintiff's testimony (R. 82) and, again, at the close of the entire evidence (R. 158), defendants moved for a directed verdict. In both motions the defendants argued, among other things, that there was no evidence that the union's refusal to carry the grievance to arbitration was discriminatory; malicious or in bad faith, and that the subject matter of the action was one within the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act.

The case was submitted to the jury. The Court instructed the jury that if the company's claim that the plaintiff was not physically fit was false and its refusal to reinstate Owens was wrongful, and if the union "arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so) refused to carry the grievance to arbitration, then the jury should find for the plaintiff. (R. 160-61). The jury was further instructed that if it found that the conduct of the defendant was 'willful, wanton and malicious' it could

award punitive damages against the union (R. 162). On the other hand, the court instructed the jury that if it found that the union and its representatives acted "reasonably and in good faith," and not "maliciously, arbitrarily, wantonly or wrongly," it should find for the defendants. (R. 162, emphasis added).

The jury returned a verdict for Owens in the sum of \$10,300: \$7,000 for actual damages and \$3,300 for punitive damages (R. 165). The defendants thereupon moved for judgment in accordance with their prior motion for a directed verdict, and in the alternative for a new trial. In addition to the grounds previously urged, the motion complained of the trial court's failure to instruct the jury as to what constituted a wrongful refusal by the union to take the case to arbitration, and the assumption, implicit in the court's charge, "that the result of an arbitration proceeding would have been the restoration of the job and seniority rights to plaintiff." (R. 168-169). The court sustained the motion on the ground that the conduct of the defendants was arguably protected under the National Labor Relations Act and that exclusive jurisdiction over the subject matter lay with the National Labor Relations Board. (R. 171).

Owens appealed to the Kansas City Court of Appeals. Prior to argument, he died and his administrator was substituted as the appellant. (R. 202). The Court of Appeals on April 5, 1965, affirmed the judgment of the trial court, with one judge dissenting. (R. 193-201). On motion for rehearing or transfer to the Supreme Court of Mis-

Since Owens died subsequent to the trial, the death certificate is not contained in the record. It is on file at the Ramas City Department of Health, Division of Labor Statistics. Certificate of Death No. 20716 shows that Benjamin Owens, Jr., died on December 8, 1964 and that the cause of death was "cardiovascular accident due to hypertension." The record does show the substitution of his stimulaturator on January 18, 1965. (R. 202).

souri, the Court of Appeals transferred the case to that Court (R. 203).

On December 13, 1965, the Supreme Court of Missouri reversed the Court of Appeals. The court's opinion dealt primarily with the issue of federal pre-emption, and concluded that the National Labor Relations Act had not preempted the jurisdiction of the Missouri courts. The court reasoned that the conduct of the defendants was not arguably an unfair labor practice because there was no showing that the union had discriminated against Owens. The union had nothing to do with Owens being discharged, it said, there was no evidence that it desired that some other member of the union obtain the job from which he had been discharged, nor was there any evidence to indicate that the union's representatives took any action to prevent the reemployment of Owens or to expel or suspend him from union membership. The crux of the plaintiff's claim was that he was wrongfully discharged by the employer, and that the union wrongfully refused to process his claim to arbitration and thus prevented him from being restored to his job. Since discrimination was neither alleged nor submitted to the jury as an element of the claim, the court concluded, the defendants' action was not arguably an unfair labor practice and the Missouri courts had jurisdiction.

The court also dealt with the defendants' contention that there was no evidence to support the verdict. Viewing the evidence concerning Owens' physical condition in the light most favorable to appellant, the court said, there was sufficient evidence from which the jury reasonably could have found that the union, as the plaintiff's agent, had arbitrarily and without just cause or excuse refused to carry the grievance to arbitration.

On this basis the court ordered that the cause be remanded with directions to reinstate the verdict for the plaintiff, with only the modification that the award of puni-

tive damages in the amount of \$3,300 be reduced to the \$3,000 prayed for in the complaint. (R. 205-218).

SUMMARY OF ARGUMENT

T

Collective bargaining, as it has developed under the National Labor Relations Act, is "an effort to erect a system of industrial self-government." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960). The basic collective bargaining agreement is typically a comprehensive code governing virtually all aspects of the employment relationship. The agreement is necessarily phrased in general, and sometimes ambiguous, language, which requires daily interpretation and application. The employer, in the process of managing the business, interprets and applies the agreement in the first instance, but his actions are then ordinarily subject to challenge through a contractual grievance procedure.

The typical grievance procedure usually begin with a conference between the aggrieved employee and his foreman. If the matter cannot be settled at that level, it can be appealed, usually by the union, through a series of steps involving union-management conferences at increasingly higher levels of authority. If no settlement is reached at any of these steps, the agreement generally provides that the union may refer the matter to arbitration. The agreement in the present case contained this type of grievance procedure.

Such a grievance procedure can only work if the vast majority of grievances are settled at one of the preliminary steps. If both parties adhere adamantly to their initial positions, regardless of the merits of the case, and insist that all grievances be arbitrated, the procedure would simply break down, to the disadvantage of all of the employees. It is both physically and financially impossible to arbitrate all grievances. Thus, the union's role in the handling of grievances is not merely to prosecute individual claims regardless of their merits, but also to protect the interests of all employees by screening grievances, dropping frivolous ones, and compromising doubtful ones.

The problem in this case, therefore, is to strike the proper balance between the interests of the individual grievant and the interests of the group in the preservation of

an effective grievance procedure.

II

Federal law establishes the legal framework within which collective bargaining takes place, and within which this balance must be struck. The National Labor Relations Act establishes the right of employees to bargain collectively and the authority of a union chosen by a majority to act as the exclusive bargaining representative of all employees in a bargaining unit. In the exercise of this authority, a union has broad discretion to make and implement bargaining decisions which it believes to be in the interest of all or most of the employees represented, even though, at times, such decisions may be contrary to the interests of certain employees. On the other hand, a union has a duty to act fairly and in good faith, without hostility toward or invidious discrimination against any employee.

These principles governing the union's authority and responsibility apply to both the negotiation of an agreement and the handling of grievances. Collective bargaining is defined by the Act as including not only the negotiation of an agreement, but also of "any question arising thereunder." While a proviso to Section 9(a) also allows an employer to deal directly with an individual employee in the adjustment of a grievance, this does not negate the union's authority and responsibility in this area if the grievance is not settled. Accordingly, contractual grievance procedures, such as the one involved in this case, typically

give the union the exclusive authority to decide whether grievances should be processed into the higher steps if the employee himself is unable to obtain relief: if the union refuses to take the grievance, the individual himself has no contractual or legal right to process it further under the contract. The question in this case, therefore, is what right, if any, the aggrieved employee has against the union after it exercises that authority not to arbitrate.

The principles which this Court has developed with respect to arbitration in suits under Section 301 of the Labor Management Relations Act are, of course, relevant to this question. But the liability sought to be imposed is statutory, not contractual. A suit against the union for breach of is duty to an individual grievant is not a suit to enforce the collective bargaining agreement under Section 301. Humphrey v. Moore, 375 U.S. 335 (1964), is not to the contrary. The plaintiff employee in that case sued to enforce his contractual rights against the employer. In order to do so, he had to challenge a grievance settlement made by his union with the employer, and he therefore joined the union as a defendant and claimed, inter alia, that the settlement was made in violation of the union's duty of fair representation, and was therefore void: But the essential nature of the suit was to enjoin a violation of the collective bargaining agreement by the employer. In the present case, on the other hand, the employer is not a party, and the suit must be sustained, if at all, as one to remedy a violation by the union of its statutory duty.

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There was no evidence, and no finding, in this case of bad faith, dishonesty, or discrimination on the part of the union. At most, the plaintiff was able to convince a jury, on the basis of conflicting evidence, that his grievance had merit. A union which exercises its responsibility to settle a grievance should not be held liable on any such basis but

only for violation of the duty of fair representation.

To permit such de novo review by a court or jury of a union's good-faith evaluation of the merits of a grievance would greatly impede, if not destroy, the ability of unions to settle grievances. Many grievances involve factual disputes, and there is usually some evidence to support the grievant's version of the facts—his own testimony, if nothing else. If a union is to exercise its responsibility to settle grievances, it must have the authority to make an evaluation of the evidence, without the risk of substantial liability if a court or jury disagrees with that evaluation. Federal labor policy favors the settlement of disputes, including grievance disputes, through free collective bargaining. This process cannot operate if every settlement which is adverse to any individual employee is reviewable de novo by the courts.

The standard which must be applied in cases of this kind must be the same standard as this Court has previously applied in other cases: the union must act fairly and in good faith. Here the plaintiff made no claim of, and produced no evidence even suggesting, bad faith or discrimination. The union, for its part, affirmatively showed that it had carefully investigated the grievance and had decided against arbitration only on the basis of an impartial medical report. And, finally, the Supreme Court of Missouri specifically affirmed the jury's verdict on the ground that there was no union discrimination against or hostility to the plaintiff but only a dispute as to the merits of his grievance.

IV

Prior to 1962, it had generally been assumed that a violation of the duty of fair representation which is implicit in Section 9(a) of the Act was not an unfair labor practice under Section 8 and that the duty was, therefore, enforceable by the courts. Beginning in 1962, however, the National Labor Relations Board has held, in a series of cases, that a

violation of the duty of fair representation is an "unfair labor practice" remediable by the Board.

The Board's jusisdiction to remedy unfair labor practices is, of course, exclusive. This exclusive jurisdiction extends not only to conduct which is concededly an unfair labor practice, but also to conduct which is "arguably" an unfair labor practice. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Thus, even though the Board is divided as to whether a violation of the duty of fair representation is an unfair labor practice, the courts must respect the Board's decisions on this question until the issue is finally settled on review of a Board order. Accordingly, the present case should have been dismissed for lack of jurisdiction.

V

Whether the appropriate forum be a court or the National Labor Relations Board, the appropriate remedy where a union has breached its fiduciary obligation to process a grievance to arbitration is not an award of damages but an order directing that the grievance be arbitrated.

A suit for damages, whether brought against the union or against the employer, has two major defects. First, it requires that the court determine not only the issue of the union's breach of its obligation to the employee, but also the merits of the employee's grievance against the employer. By thus permitting judicial determination of a question which should be determined in the arbitration tribunal, a suit for damages runs contrary to the principles enunciated in the line of cases beginning with Lincoln Mills and ending with Republic Steel v. Maddox, 379 U.S. 650 (1965). In Maddox, the Court recognized the interest of the union in participating in interpretations of the contract and in having an arbitrator rather than a court decide questions arising under it. Both the union and the employer have such an interest and that interest would be ignored if a

suit for damages could be entertained against either.

Second, the remedy in damages has quite different consequences to both the plaintiff and the defendant than the remedy usually available before an arbitrator. In a discharge case such as this one, for example, the usual remedy in arbitration is reinstatement with back pay, while the remedy granted in a damage suit, whether against the union or the employer, is usually the earnings, both past and prospective, lost by the discharged grievant.

Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio, 1954), reversed sub nom, United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956), provides an apt illustration of both problems. The district court there granted damages based on the plaintiff's life expectancy on a finding that his compulsory retirement at age 65 was contrary to the collective bargaining agreement. The court of appeals reversed because it construed the agreement as permitting compulsory retirement. Both decisions illustrate the problems created by a suit for damages.

For these reasons we believe that the appropriate remedy, where a union has allegedly violated its duty in failing to take a case to arbitration, is a suit against both the union and the employer for an order directing that the grievance be arbitrated. If the court (or the Board) finds that the union has violated its fiduciary obligation, it should enter an order containing appropriate safeguards to insure fair presentation and decision. Where appropriate, such an order should also provide for recovery by the employer against the union for any damages which the employer may suffer due to the expiration of the time limits for requesting arbitration, since such costs are attributable to the union's failure to request arbitration without a court order. Such a remedy is consistent with the federal labor policy and appropriately preserves the rights of the grievant, the union and the employer.

In this case suit was brought separately against both the

union and the employer. Each suit required, for decision, that the court rather than an arbitrator determine the merits of the grievance. And each suit requested damages rather than reinstatement and back pay. For the reasons indicated, we believe that neither suit was proper and that the judgment obtained in this one should be reversed.

ARGUMENT

INTRODUCTION

This case presents yet another aspect of the developing federal law governing the relationship between union, employer and employee in the administration and enforcement of the collective bargaining agreement. The precise questions in this case—the nature of the union's responsibility to process an individual employee's grievance, the appropriate forum in which that responsibility may be enforced and the nature of the remedy to be provided—cannot be decided without reference to the context, both factual and legal, in which these questions arise. We will, therefore, attempt first to sketch out both the nature of the process and those aspects of the law governing it which this Court has so far defined. We will then address ourselves, within that framework, to the particular questions presented here.

I. THE PROCESSING OF GRIEVANCES UNDER A COLLECTIVE BARGAINING AGREEMENT IS AN INTEGRAL PART OF THE COLLECTIVE BARGAINING PROCESS

Collective bargaining, as it has developed under the National Labor Relations Act, in most cases involves much more than the negotiation of increases in wage rates. The typical collective bargaining agreement covering an industrial plant has been aptly described by Archibald Cox:

"No state or federal statute, except possibly the tax laws, covers as wide a variety of subjects or impinges

upon as many aspects of the ordinary company's business or a worker's life—wages, hours of employment, working conditions, health and accident, insurance, retirement, pensions, promotions, lay-offs, discipline, subcontracting, technological changes, work loads, and a host of minor items. Gox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1490 (1959).

Or, as this Court described the agreement, in United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960) "a collective bargaining agreement is an effort to

erect a system of industrial self-government."

This self-government has two interrelated aspects. The first is legislative—the enactment through collective bargaining of the basic code of rules to govern the relationship between employer and employee. Typically, this code is adopted for a fixed period of years. Its termination date, unlike the termination date of an instrument of commerce, is not the end of the relationship but the agreed upon time for the negotiation of amendments to the code.

The second aspect is administrative and judicial. Obviously the collective bargaining agreement like any statute covering so much in so few words, requires interpretation and application. And this is supplied by the grievance

procedure.

The agreement, of course, is acutally administered by the employer, not by the union or by the employees. Joint administration is rare, if not non-existent, in the American experience. It is management's job to recruit and hire employees, to train them, to schedule the work, to assign workers to jobs, to transfer and promote employees, to pay the wages and determine the appropriate rate of pay, to lay off workers and to recall them when business picks up, and to discharge them or relieve them from work. In these actions, and all of the others which comprise the management of the enterprise, the employer is the actor and the director. The agreement guides his actions, but it is the employer who

makes the decisions in the first instance. See Davey, Contemporary Collective Bargaining (1959), p. 118.

The machinery by which those actions are tested and by which, through such testing, specific content is given to the rules expressed by the agreement is the grievance procedure. The employer acts. If an employee believes that the action is contrary to the agreement, he grieves. "The processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement." United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 581 (1960).

Grievance procedures follow a fairly uniform pattern. The first step is usually a conference between the aggrieved employee and his foreman, sometimes with and sometimes without a union representative present. Subsequent steps usually involve a series of meetings between union and employer representatives, at increasingly higher levels of authority. If the matter cannot be settled at any of these steps, the union typically has the right to refer the dispute to binding arbitration.

The existence of these steps and the function they perform are of the utmost importance for this case. The steps are not merely formalities, or delaying devices. The fact that they exist almost uniformly in collective bargaining agreements is testimony that all parties regard them as significant and important parts of the system.

The function of the steps is to resolve, through analysis, review and bargaining, as many grievances as possible without arbitration. It is essential to the process that this be done. And the extent to which it is done is, in large measure, an indication of the health of the system of self-government. Indeed, one of the persistent problems faced by collective bargaining in the United States is to isolate and remedy the causes of "distressed" grievance procedures. As Arthur Ross, then Director of the Institute of Industrial

Relations, University of California, and now United States Commissioner of Labor Statistics, wrote in 1959:

"There is no doubt that some parties arbitrate too much. They arbitrate chronically and promiscuously. Arbitration becomes a mill, rather than a court of last resort, a substitute for the grievance procedure rather than a means of strengthening it."

Where this happens, as appears to be the case under the National Railroad Adjustment Board, the consequence is not only delay but a failure of the procedure and of the ultimate arbitration itself to fulfill its function of interpreting the agreement and settling disputes. See Mangum, Railroad Grievance Procedures, 15 Industrial and Labor Relations Review 474, 498 (1962).

The grievance procedure, then, is an extension of the bargaining process. The agreement itself establishes the broad rules. As cases develop, it is the function of the grievance procedure to develop and implement the rules through the settlement of cases, by agreement where possible and by arbitration if agreement is impossible. As one authority has described it:

"The grievance procedure is really a conference technique by which two parties agree on how a rule (which both accept) should be applied in a particular situation." Chamberlain, Labor (1958), 238.

"The significance of this . . . procedure can hardly

In the First Division, covering operating employees, the average time for processing a grievance through the arbitration proceedings of the Board is about ax years (one or two years for processing on the properties plus between four and five year for processing by the Board). Id. at 494.

^{*}Ross, "The Role of the Law in Arbitration: A Panel Discussion."

Arbitration and the Law, Proceedings of the Twelfth Annual Meeting,
National Academy of Arbitrators (BNA, 1959), p. 72. See also Ross,
"Distressed Grievance Procedures and Their Rehabilitation," Labor
Arbitration and Industrial Change, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (BNA, 1963), p. 104.

be overstressed. It is one of the truly great accomplishments of American industrial relations. For all of its defects—the bypassing of some of the appeals stages, its use by the union as a political device to convince the employees that it is looking out for their interests, the slowness with which it sometimes operates-it constitutes a social invention of great importance." Id. at 240.

The system works only where each party makes an effort to maximize the number of cases settled by agreement and to minimize the number of cases settled by arbitration.

Grievances, of course, are of all sorts. Some involve the simplest of factual disputes. Others involve complex calculations of rates of pay, as under incentive plans. Some involve only the interests of the grievant. Others may involve conflicts between employees. Almost every seniority grievance, for example, involves a claim that the grievant, rather than some other employee, should have been promoted to a particular job, or retained at the time of layoff, or recalled to work when the level of operations increased. Still others involve the interpretation of general or ambiguous language in the agreement and their disposition will settle not only the particular case but the meaning of the contractual provision for the future.

It is because of this variation that the procedure contains steps. Some disputes as to the propriety of management's action can be settled between the worker and the foreman, some need the involvement of the division superintendent and the union representative and so forth, up to-in the contract in this case—the fourth step, which involves the General Superintendent of the Company and the national

representatives of the union.

Whatever the nature of the grievance, however, both the union and the employer have a vital interest in utilizing the grievance procedure, to the maximum extent possible, as a settlement machinery. The interests of the employees as a

group, which the union represents, demand a course of conduct other than blind and undeviating pursuit of every individual's claim. Insistence upon a literal interpretation of language which produces an absurd result may be the way to maximize the interests of a particular grievant, but "next week, when the union pleads for common sense in handling another grievance its words will be thrown back in its face." Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 608 (1956). On the other hand, if a union shows a willingness to drop frivolous grievances, and compromise doubtful ones, the employer will be inclined to be equally accommodating: Finally, of course, unless both sides make a sincere effort to use the grievance steps for the purpose of settling grievances, rather than as mere way stations on the road to arbitration, the procedure itself will break down. lhe approformatemental antiform auto-

Because every grievance; to some degree, involves the interests of all employees, most agreements provide, as the one in this case does, that the union, rather than the individual grievant, will control the higher steps of the grievance procedure, including arbitration. The interest of the group in the existence and continued efficient functioning of the procedure requires that the union exercise responsibility and discretion in the prosecution of grievances.

he is in the light of this institutional requirement that we approach the question of the rights of the individual griev-

One of the reasons for the distressed nature of railroad grievance

procedures has thus been described:

"An unusual properaity for backpassing seems typical of railroad "An innumal properaity for buckpassing seems typical of railroad labor relations. The railroad brotherhoods are highly democratic and not well structured for firm decision making. Local chairmen accept and process weak cases, either because it is not politically expledient to question the validity of the case, or on the off-chance the case may ultimately be sustained. General chairmen pass the cases on for the same reasons." Mangum, Railroad Generals: Proceeders; 15 Industrial and Labor Relations Review 490 (1962):

ant where the union fails or refuses to process his grievance. That question must be answered, we believe, by striking an appropriate balance between the conflicting interests of the group and of the individuals comprising that group. Before addressing ourselves directly to the problem, however, we think it appropriate to sketch out the sources of the law applicable to the problem and the extent to which the existing decisions of this Court confine the possible solutions.

IL THE NATURE AND SCOPE OF A UNION'S OBLE GATION TO INDIVIDUAL EMPLOYEES IN THE HANDLING OF THEIR GRIEVANCES MUST BE DETERMINED AS AN ASPECT OF THE UNION'S DUTY OF FAIR REPRESENTATION

The system of contract negotiation and administration which we have thus far described is based upon and governed by federal law, and this Court has already defined certain aspects of the problem in applying that law.

(a) The National Labor Relations Act.

The first source of the federal law is the National Labor Relations Act. Section 7 of the Act, 29 U.S.C. § 157, confers upon employees the right to bargain collectively. And Section 9(a), 29 U.S.C. § 159(a), provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

"Pursuant to that provision an employer is required to negotiate with a properly designated union—and only with the union—concerning those subjects. Sec 1. I. Gare Go. v. NLRB, 321 U.S. 332 (1944).

This Court has, in a series of cases, indicated the breadth, and the limits, of the union's right to subordinate indi-

vidual rights to the group interest in the negotiation of agreements. In Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949) the Court held valid, against a veteran's claim, a provision, inserted in a collective bargaining agreement during his military service, providing top seniority rights for shop stewards or union chairmen, superior to the preferential rights granted to veterans by law. Such a provision, the Court said, benefited all of the employees, veterans as well as nonveterans, "by promoting greater protection of their lights and smoother operation of labor-management relations." 337 U.S. 521. Therefore, even a veteran whose seniority status was protected by law could be faid off pursuant to the provision enacted in his absence giving superseniority to union stewards.

The authority of the collective bargaining representative is not unlimited. In a series of cases which first arose under the comparable provisions of the Railway Labor Act, the Court held that the grant of exclusive bargaining authority. carried with it a responsibility to make an honest effort to serve the interests of all, without hostility to any. Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944). Sec also Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Graham v. Brotherhood of Locomotive Firemen, 838 U.S. 232 (1949); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952). This duty, the Court held, not only limited the authority to make an agreement. It provided an affirmative basis upon which suit could be brought for injunctive relief and for damages. See: Gentral Georgia Ry. v. Jones, 242 F.2d 230 (5th Cir. 1956), cert. denied, 352 U.S. 848 (1956), Richardson v. Texas & New Orleans R. Co., 242 F.2d 230 (5th Cir. the at properly designated avalon-1957).

In 1953 the Court made it clear that this same duty applied under the National Labor Relations Act. In Ford Motor Go. v. Hufmon, 345 U.S. 330 (1953), suit was brought for an injunction against the continued enforce-

ment of an amendment to the seniority previsions of the agreement giving veterans who had not previously worked at Ford seniority credit for their military service. The plaintiffs claimed this amendment discriminated against employees who had been hired before the veterans and before the adoption of the amendment. The Court socepted the proposition that the principle of the Steels case applied under the National Labor Relations Act, and restated it, but found against the plaintiffs. "The complete minimation of all who are represented," the Court said, "is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete goodsfaith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

These cases dealt only with the negotiation of the collective bargaining agreement, not the adjustment of grievances under an agreement. But the same statutory provisions provide the source of law in the latter area. The Act specifically provides, in Section 8(d), 29 U.S.C. § 158(d), that the duty to bargain includes not only the duty to negotiate an agreement but also the duty to negotiate "any question arising thereunder." 29 U.S.C. § 158(d). And Section 9(a) itself contains a specific proviso dealing with the adjustment of grievances. After setting forth the principle of exclusive representation, it continues:

"Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Most collective bargaining agreements, like the agree-

ment in this case, conform to this statutory mandate. In the lower steps of the procedure (here in the first two steps) the individual worker is permitted to present the grievance. But the higher steps, including the arbitration step, are solely within the union's control, as representative of the entire group. Although this Court has never passed directly on the question, most courts have held that the union has the power to settle a grievance at one of these steps either by dropping it or by accepting a compromise—and that the individual cannot veto that decision and continue to process the grievance on his own. Black Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962): Palnau v. Detroit Edison Co., 301 F.2d 702 (6th Cir. 1962); Ostrofsky v. United Steelworkers, 171 P. Supp. 782 (D. Md. 1959), affirmed 273 F.2d 614 (4th Cir. 1969), cert. denied, 363 U.S. 849 (1960). See also Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 616-30 (1956);

There is a minority view which holds that the proviso to Section 9(a) of the National Labor Relations Act 29 U.S.C. § 159(a), gives an individual an indereasible right to process his grievance on his own if his union refuses to Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362 (1962); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963). The more widely accepted interpretation of this language, however, is that its "only effect" is "to make it plain that the employer's duty to bargain exclusively with the representative designated by a majority of the employees is not violated if he chooses to receive grievances from individuals." But that "an employer may lawfully promise the union not to process individual grievances and may also give the union the only legal right to compromise or enforce substantive obligations." Cox, Rights Under-a Labor Agreement, 69 Harv. L. Rev. 601, 624 (1956). See also Comment: Federal Protection of Individual Right: Under Labor Gontracts 73 Vale Lat. 1215, 1216-22 (1964) 100 300 10

This Court did, in Elgis, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), 327 U.S. 633 (1946); marply distinguish between the authority of a union to make a collective bargaining agreement under the Railway Labor Act and its authority to settle a grievance under that Act. On the basis of that distinction it held that, under that Act, a union settlement under the Adjustment Board procedures did not preclude an individual suit. But there, of course, the grievance procedure is established by statute, not by contract. And the Court's holding, at the most, constituted a reading of the statutory procedure. In agreements under the National Labor Relations Act, to the contrary, the procedure is established by contract. And, with the dissent noted most courts have refused to override the explicit provision in the contract giving the union exclusive control over the higher steps of the adjustment machinery.

Assuming as we do, therefore, that the union's action in settling, or dropping a grievance, is in accordance with its statutory power, we are faced with the question in this case—what, if any, right of action does the aggrieved individual have against the union after it exercises that power. Before turning to that question, we examine briefly the other possible source of federal law governing the question, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

(b) Section 301 of the Labor Management Relations Act

While the right to bargain collectively, and the duty to do so, set forth in Sections 7 and 9 of the National Labor Relations Act, were made enforceable through the procedures of the National Labor Relations Board, Congress decided in 1947 that the enforcement of collective bargaining agreements, once made, should be "left to the usual processes of the law." It therefore provided in Section 301 that

^{*}H.R. Conf. Rep. No. 510, 80th Cong., 1st Sea, p. 42.

mits to enforce such agreement could be brought in the federal district courts. It is now well established that Section 301 is not only a grant of jurisdiction but also the source of federal substantive law "which the courts must fashion from the policy of our national labor laws." Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957). It governs any claim based on a collective bargaining agreement, whether brought in a state or federal court. Charles Down Bas Go. v. Governey, 368 U.S. 502 (1962); Local 174, Teamsters v. Lincoln Flour Co., 369 U.S. 95 (1962); Smith v. Evening News Asia, 371 U.S. 195 (1962).

Following Lincoln Mills, this Court has established certain principles which bear on the problem in this case. Lincoln Mills itself established that the promise to arbitrate was enforceable by suit under section 301. In United Steelworkers v. Warrior & Gulf Nap. Go., 363 U.S. 574 (1960), the Court held that in such a suit the question whether a particular dispute came within the arbitration provision was to be decided by the courts but that, in so deciding, doubts should be resolved in favor of coverage and an order to arbitrate should not be denied "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-583. It came to that conclusion because, in the Court's words, "the grievance machinery is at the very heart of the system of industrial self-govemment. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

The grievance procedure is, in other words, a part of the continuous collective bargaining process." 363 U.S. at 581.

In Smith v. Eseming News, 371 U.S. 195 (1962), the Court held that Section 301 encompassed not only suits by unions but also suits by individual employees against the estiplicyer to recover rights claimed under the collective

agreement. In that case "there was no grievance arbitration procedure" (371 U.S. at 196, in 1) such as existed in Warrior & Gulf and in this case. Where such procedure does exist, the Court subsequently held in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), the employee must attempt to use it, and cannot bring suit directly on the contract.

One final case deserves note Humphrey v. Moore, 375 U.S. 335 (1964). In that case, Moore, an individual employee brought suit against both his employer and the union, seeking to enjoin his prospective termination from employment as in violation of the seniority provisions of the collective bargaining agreement. One obstacle in the way of Moore's suit to enforce the agreement was that his seniority. rights had been the subject of a grievance and a settlement of that grievance adverse to Moore had been made by the joint union-management committee established under the grievance procedure. This settlement, Moore contended. was invalid for two reasons: first, he claimed, the joint union-management committee which made the settlement had exceeded its authority under the provisions of the agreement which established that committee; second, he alleged, the union in making the settlement had violated its duty of fair representation. He therefore sought an injunction against his discharge which, he claimed, "would violate the contract." 375 U.S. at 344.

The majority of the Court assumed, "with Moore and the courts below" that the committee's authority was limited and that a settlement which exceeded the committee's authority could be set aside as if it were an arbitrator's award. 375 U.S. at 345. It concluded, however, that the committee's authority was not limited by the agreement in the way the plaintiff claimed but, to the contrary, that the settlement was in accordance with the agreement. It rejected the plaintiff's second claim that the union had violated its duty of fair representation and concluded that it

had acted "honestly, in good faith and without hostility or arbitrary discrimination." 375 U.S. at 350. Therefore, the Court concluded, the grievance settlement was valid and binding on the plaintiff and barred the suit. 10

In a concurring opinion, Justices Goldberg and Brennan came to the same result via a different route. The settlement, they believed, should not be viewed as if it were an arbitrator's award but as, itself, a collective bargaining agreement. Since the grievance procedure was part of the continuous collective bargaining process, the parties had a right, in that procedure, to go beyond the provisions of the underlying agreement and make a new agreement, modifying if necessary the underlying contract. Suit could therefore not be brought under Section 301 to enforce the prior agreement since, even if the plaintiffs were right, the parties had a right to change it. The suit could be brought, in their view, only as one against the union for breach of the duty of fair representation under the doctrine of Ford Motor

To All members of the Court treated the settlement which "andwiched" seniority lists and thus reduced Moore's relative seniority status as a grievance settlement. The Court described the union's actions as "the settling of the grievances at issue." 375 U.S. at 343. The concurring opinion of Mn Justice Goldberg specifically described the settlement as "a mutually acceptable grievance settlement." 375 U.S. at 352. Mr. Justice Harlan described it as a "grievance settlement." 575 U.S. at 359. We have therefore so treated it here.

It is extremely doubtful, however, whether the decision of the joint committee was a grievance settlement in the usual sense of a settlement of a complaint that the contract had been violated, or that it was

of a complaint that the contract had been violated, or that it was arbitrable as such a grievance. The contract did not provide for analytiching, or for any other rule, to cover cases of merger or absorption. It provided instead that, in such cases, the seniority of the employees would be settled by agreement and that the grievance procdure would be utilized as the method for negotiation.

It is our view, therefore, that the approach to the question of § 301 jurisdiction by justices Goldberg and Breatian was the mire appropriate, not necessarily because the settlement of a grievance should be treated as a new agreement between the parties but because the settlement involved in the case was not rully a grievance settlement at all. As should, however, so Justice as regarded it.

Co. v. Huffman. They concurred, however, that no case had been made out under that doctrine.

Mr. Justice Harlan concurred with the majority insofar as it treated the suit as one to enforce the underlying agreement, saying that the committee was a grievance, not a negotiating, committee and he saw no reason why an individual could not sue the employer if the settlement made by that committee was contrary to its authority. Insofar as the claim rested on unfair representation, he concurred with Justice Goldberg but believed that this raised a serious question of pre-emption which should be re-argued. 375 U.S. at 359-60.

For purposes of the present case, the key aspect of Humphrey is that the plaintiffs in that case did not assert any rights against the union based on the collective bargaining agreement, and no member of the Court held that such rights could be asserted in a Section 301 mit. Plaintiffs asserted certain rights against the employer, and claimed ... that those rights had survived the grievance settlement because that settlement was invalid and void for the reasons stated above. Although the union was joined as a defendant because the validity of the grievance settlement was an essential issue in the case, the Court treated the case # essentially a suit against the employer for breach of the agreement, and therefore within Section 301 of the Labor Management Relations Act, under the authority of Smith v. Evening News Ass'n, 371 U.S. 195 (1962). In the opinion of the concurring Justices, the suit was only (Goldberg and Brennan, J.J.) or also (Harlan, J.) one for breach of the duty of fair representation implied from Section 9(a) of the National Labor Relations Act. But neither the majority nor the concurring Justices indicated that a suit against a union alone for failing to process a grievance could be based upon anything other than the statutory duty of fair representation after some most rade bobology ovid a

It is against this background that we approach the issues

presented in this case. Those issues are (1) did the union in this case fail to meet the standard of responsibility to employees in the handling of their grievances imposed by the duty of fair representation, and (2) if it did is the remedy in damages here invoked an appropriate one.

III, THE UNION IN THIS CASE DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION

The complaint in this case alleged, in substance, that plaintiff's employer, Swift & Company, had violated its collective bargaining agreement with the defendant union by refusing to permit plaintiff to return to work on the ground that he was physically disabled, when in fact he was physically able to work, and that the union "arbitrarily, capriciously, and without just or reasonable reason or cause" refused to process his grievance to arbitration. The theory of the complaint appears to be that a union has a legal duty to process meritorious grievances through all the grievance steps, and that if an employee can satisfy a court or jury that he had a meritorious grievance which the union refused to process, then he is entitled to recover damages from the union based on his lost earnings. Although the complaint alleged that the union "arbitrarily" and "capriciously" refused to process the grievance, it is clear from the plaintiff's proof that his theory was that if the jury should find, as it subsequently did in this case, that the grievance was in fact meritorious, any decision by a union not to process it on the ground that it lacked merit was ipso facto arbitrary and capricious, and therefore unlawful.

This was also the theory of the Supreme Court of Missouri: In holding that there was sufficient evidence to support the jury's finding that the union had "arbitrarily" and "without just cause or excuse" failed to process the grievance, the Court said:

"We have concluded that there was sufficient evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the pass. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following its discharge. We accordingly rule this point adversely to defendants." (R. 217):

In short, the court held that the evidence in the record which tended to show that 'the plaintiff was sufficiently healthy to perform his job was all that was required to support the judgment against the union. The union had acted "arbitrarily, if so, and without just cause or excuse" (R. 161) because it was wrong in its evaluation of plaintiff's physical condition.

The absence of any other basis for its holding is underlined, not only by the fact that the plaintiff produced no evidence whatsoever of hostility or discrimination against the plaintiff and the jury was required to find none, but also by the Missouri court's treatment of the pre-emption question. In its view, if it were alleged that the union was hostile to Owens, or discriminated against him, the court would have no jurisdiction. The question, in such a case, would be one for the National Labor Relations Board. The court had jurisdiction, it believed, precisely because the only claim was that the union was honestly wrong on the merits of the grievance.

We believe that the governing federal law with respect to the union's responsibility in the processing of grievances is directly contrary to the standard thus imposed by the

Most of the duty-of-fair-representation cases which have come to this court have involved claims of racial discrimination by the union. Obviously, it is indefensible for a union to refuse to process an employee's grievance, or to make any other collective bargaining decision, solely because of racial considerations, and the cases involving such conduct have not required any extensive consideration of the scope of the duty of fair representation.

In those cases which have not involved discrimination against employees on racial or other invidious or irrelevant grounds, however, the Court has held that a union has wide discretion in the performance of its collective bargaining functions. Thus, in Ford Meter Co. v. Huffman, 345 U.S. 330 (1953), the Court said:

The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

Similarly, in Humphrey v. Moore, 375 U.S. 335, 350 (1964), the Court again held that a union had the right to take a position on a seniority issue which was contrary to the interests of certain employees, so long as the union "took its position honestly, in good faith, and without hostile distinguishments."

Significantly, the Court applied precisely the same standard in both Huffman and Humphrey, although one involved the negotiation of an agreement and the other, in the view of the majority of the Court, involved the settlement of a grievance. We believe the same standard must be applied in the present case.

The only way in which the present case differs from those cited above is that the union's decision in this case not to take the plaintiff's grievance to arbitration was based primarily on a factual determination, namely that the plaintiff was not physically able to work, while Huffman and Humphrey each involved a policy decision by a union as to which of two conflicting sets of employee interests was most worthy of protection. In neither type of case, however, is it proper for a court or jury to substitute its judgment for the judgment of the bargaining representative which is authorized by statute to represent the employees involved.

In the day to day handling of grievances, unions are constantly called upon to make factual determinations similar to the one involved here. Almost every discharge case, for example, involves a factual question as to whether the employee did or did not commit the offense for which he has been discharged. Most promotion cases involve the question of whether the employee has the ability to perform the job to which he seeks to be promoted, or how his ability to perform that job compares with the ability of the employee whom management wishes to promote. When an employee claims that he has been refused a vacation or a leave of absence, the question frequently presented is how essential the employee's presence on the job was at that particular time.

Whether the grievance presents factual questions such as the examples cited above, or whether it presents a problem of interpretation of the language of the collective bargaining agreement, the union has an obligation to make a determination as to its merits. This obligation runs both to the employees and to the employer. "The employer expects and demands that the Union screen grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers." Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 793 (D. Md. 1959), affirmed, 273 F.2d 614 (4th Cir. 1960), cert. denied, 363 U.S. 849 (1960). If all grievances were to be pressed by the union, regardless of its view as to the merits, the entire procedure which has so carefully been erected would collapse.

Such a result would be contrary not only to the interests of the union but to the objectives of the federal labor policy. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), states that "Final adjustment by a method agreed upon by the parties themselves is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." The emphasis, both here and in Section 9(a), is on agreement as the method of settling disputes, agreement not only on the rules to govern the industrial community but also on the application of those rules on a case-by-case basis.

Arbitration exists, and performs the important function described by this court in Warrior & Gulf, to provide a terminal point in the event of disagreement. But arbitration would itself disappear if it were required to be utilized in every grievance. It has been said that "a company that has never really accepted collective bargaining may, by refusing to settle anything, overload arbitration to the point of breakdown." Equally, a union, by refusing to settle anything, can make the process unworkable. Arbitration can exist as the capstone of the grievance procedure only if both parties can, as they do, reach agreement in the vast majority of cases in the grievance procedure without resorting to it. It

Fuller, Collective Bargaming and the Arbitrator, Proceedings, Fiftecath Annual Meeting, National Academy of Arbitrators (BNA, 1962) p. 40. annual social and an arbitrators (BNA,

is successful insofar as it encourages the parties to settle grievances without resort to decision. See Alexander "Impartial Umpireship," in Arbitration and the Law, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators (BNA, 1959) p. 146. See also Ross, "Distressed Grievance Procedures and Their Rehabilitation," in Labor Arbitration and Industrial Change, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (BNA, 1963), p. 104. descrioti a la aread san se bas

Thus, it is as much a part of the federal labor policy with respect to arbitration that unions screen grievances and refuse to process to arbitration those which they find lacking in merit as it is that they be entitled to insist upon arbitration of those which they believe do have merit. But it would obviously be impossible for a union to perform that function if its determination that a grievance lacks merit were reviewable de novo by a court or jury. When the merits of a grievance depend upon an issue of fact, there will almost always be some evidence supporting the grievant's side-his own testimony, if nothing else. Thus, the risk of a lawsuit, and an adverse verdict, would be present in every case in which a union found a grievance lacking in merit on factual grounds. This would necessarily make a union extremely reluctant to refuse to process any grievance which was supported by any evidence, regardless how strong the evidence on the other side might seem to the union, since a court or jury would always be free to make its own independent evaluation of the evidence.

It is therefore simply inconsistent with the nature and purpose of a grievance procedure, and with the federal labor policy, to permit courts to review de novo the correctness or the wisdom of a union's decision to settle or drop an employee's grievance. The union's sole obligation is to make its decision honestly and in good faith. The swall

With the exception of the decision in the present case, this has been the unanimous view of the courts. For example, in Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825, 843-44 (1963), the court stated: "The courts cannot concern themselves with the wisdom of the union's action... [S]o long as the union in good faith exercised an impartial discretion in reaching its decision that there was good cause for the discharge, judicial intervention is impermissible." In Brandt v. United States Lines, 246 F. Supp. 982, 984 (S.D.N.Y. 1964), the court held that "where the Union refuses to prosecute an employee's claim in good faith and on the basis of a thorough investigation ..., the employee has no cause for complaint" In Stewart v. Day & Zimmerman, Inc., 294 F.2d 7, 11 (5th Cir. 1961), the court held that in the absence of collusion or fraud "union officials should be given a wide latitude in deciding intra-union disputes and ... courts should be slow to intervene in them."

In the present case, the plaintiff did not present the alightest shred of evidence that the union's refusal to take his grievance to arbitration was based on anything other than its decision, made honestly and in good faith, that the grievance was lacking in merit. The plaintiff sought only to prove that the grievance was meritorious. As for the plaintiff's testimony that the union offered to take the case to arbitration for \$300, that testimony, if believed, shows only that the union was willing to take what it believed to be an unmeritorious grievance to arbitration if the plaintiff assumed part of the cost. If the union had no obligation to take it to arbitration at all, it would plainly not be a violation of the duty of fair representation for the union to offer to take the grievance nevertheless if the grievant assumed part of the cost.

Even if we assume that plaintiff, in order to recover, need not show dishonesty or bad motive, but only that his grievance had merit, clearly any right to recover which he might have on such showing should disappear if the union, in reply, shows affirmatively the good-faith basis upon which it acted. The union made such a showing here. Its evidence showed that after processing the grievance through

all of the steps of the grievance procedure the union made an effort to obtain sufficient evidence on which to proceed to arbitration. It paid for a complete physical examination of the plaintiff, by a doctor of his choice. Only when that doctor reported that, in his opinion, the plaintiff was unable to work and, indeed, would die if he returned to work (R. 90, 101), did the union decide not to proceed with arbitra-

tion.

The evidence as to the union's decision here sharply delineates the issue. Jamerson, the union representative who processed the grievance, believed that it was no part of his job to evaluate the grievance and that the grievance should therefore be arbitrated if the plaintiff wanted it arbitrated. The union executive board, on the contrary, felt that it should not process the case to arbitration without a medical evaluation and, when that evaluation proved to be adverse, decided to hold the case in the fourth step in the hope that some change would develop which would offer some prospect of winning at a later date. Jamerson's view is precisely the view which, if it prevailed, would destroy the grievance procedure and arbitration. The union's view is the view which is essential if this form of industrial self-government is to be effective. By acting as it did the union fulfilled the function which it is the purpose of the federal labor policy to encourage. The Missouri court, in holding the union liable for so doing, contravened that policy, and its decision must be reversed. tone of the State of the State

IV. SINCE THE NATIONAL LABOR RELATIONS BOARD HAS HELD THAT VIOLATION OF THE DUTY OF FAIR REPRESENTATION IS AN UN-FAIR LABOR PRACTICE, THE COURTS ARE PRECLUDED FROM ENTERTAINING SUITS TO REMEDY SUCH VIOLATIONS

In the preceding section of this brief, we have shown that if the union had any obligation to take the plaintiff's grievance to arbitration, that obligation would have to be based on the union's statutory duty of fair representation, which derives from Section 9(a) of the National Labor Relations Act. We turn now to the question of whether that duty is enforceable by the courts or by the National Labor Relations Board as an unfair labor practice under Section 8(b) of the Act.

Until 1962, it had generally been assumed that the duty of fair representation under the National Labor Relations Act, as under the Railway Labor Act, was judicially enforceable. Many actions alleging breach of the duty were entertained in the courts without reference to the possibility that the NLRB might have jurisdiction over such matters. See, e.g., Trotter v. Amalgamated Ass'n of Street Ry. Employees, 309 F.2d 584 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962); Stewart v. Day & Zimmerman, Inc., 294 F.2d 7 (5th Cir. 1961); Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), affirmed, 273 F.2d 614 (4th Cir., 1960), cert. denied, 363 U.S. 849 (1960). Occasionally the issue was raised, but since the Board had never held that it had broad jurisdiction to remedy a violation of the duty of fair representation the courts tended to assume that the matter fell outside the Board's authority. E.g., Berman v. National Maritime Union, 166 F. Supp. 327 (8.D.N.Y. 1958). The issue was presented to this Court in Ford Motor Co. v. Hufman, 345 U.S. 330 (1953), but this Court chose to decide the case on other grounds. 345 U.S. at 332, n.A. See also Syres v. Oil Workers, 223 F.2d 789 (5th Cir. 1955) a received 350/U.S. 892/1955) 21AT TO YTUU

In a series of cases decided since 1962, however, the Board has held that violations of the duty of fair representation are "unfair labor practices" under Section 8(b) of the Ass, 29 U.S.O. § 158(b), and that it therefore has jurisdiction to remedy them. The first of these cases was difficult fair to remedy them. The first of these cases was difficult fair Oc., 140 N.I.R.R. 181 (1962); enforcement denied

a held that the right of employees to be fairly represented is one of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and that "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" is an unfair labor practice under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). The Board specifically relied on Steele and the other Railway Labor Act decisions of this Court.

In Independent Metal Workers Union (Hughes Tool Co.), 147 NLRB 1573 (1964) the Board held that a union's failure to process an employee's grievance on grounds of race was an unfair labor practice under Sections 8(b)(1)(A), 8(b)(2) and 8(b)(3), 29 U.S.C. §§ 158(b)(1)(A), (2), (3). In that decision, the Board explicitly stated that the cuty which it was enforcing was enforced by the courts under the Railway Labor Act solely because, under that Act, there is no administrative enforcement machinery:

When the Supreme Court enunciated the duty of fair representation in Steele and Tunstall, supra, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Pederal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical

The Second Gircuit reversed the Mirande decision, but there was no majority on the question of whether a violation of the duty of fair representation is an unfair labor practice. Judge Medina wrote an opinion holding that the Board's jurisdiction is limited to cases where "the union or the employer. As we committed some act the natural and foresemble consequence of which is to be beneficial or detrimental to the union," and that other forms of unfair or discriminatory action by a union are remediable only in the courts. 326 F.2d at 175-180. Judge Lambard consented in the result without stacking this question, and Judge Friendly discented.

tional Labor Relations Act are enforcible by the Federal courts, not an administrative agency.

After enactment of the Taft-Hartley Act... an administrative remedy [for breaches of the duty of fair representation] became available in our view.

N.L.R.B. at 1575.

The Board has applied its rule that breach of the duty of fair representation is an unfair labor practice in several subsequent cases. Local 1367, International Longshoremen's As's, 148 N.L.R.B. 897 (1964) (now pending on review in the Fifth Circuit); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), (now pending on review in the Fifth Circuit); International Union, United Automobile Workers, 149 N.L.R.B. 482 (1964); Cargo Handlers, Inc., 159 N.L.R.B. No. 17 (June 17, 1966).

It is, of course, well-established that the jurisdiction of the National Labor Relations Board to remedy "unfair labor practices" as defined in the Act is exclusive:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting

adjudications as are different rules of substantive law. The same reasoning which probabits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." Games v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953).

Admittedly, the question of whether violation of the duty of fair representation is an unfair labor practice is far from clear. Two members of the Board, McCulloch and Fanning, have consistently dissented in these cases, and a third member who was recently appointed, Samuel Zagoria, has yet to express himself on this issue. The only court of appeals which has so far passed upon the question was also divided on it. NLRB v. Miranda Fuel Ca., 326 F.2d 172 (2d Cir. 1963). But so long as the Board continues to adhere to its position, its exclusive jurisdiction must be respected. As this Court held in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 244-45.

It is significant that Garmon involved conduct which this Court, in a subsequent case, decided was not an unfair labor practice. NLRB v. Drivers Local 639, 362 U.S. 274 (1960). Similarly, this Court may someday decide that violation of the duty of fair representation is not an unfair labor practice. But that question is not presented here. It can only be presented in a case which is decided by the Board in the first instance, and then comes to this Court on review of the Board's decision. In this case, the only question is whether a violation of the duty of fair representation is "arguably."

an unfair labor practice, and the Board's decisions on the subject obviously show that it is. 16

There is only one exception to the Board's exclusive jurisdiction to remedy unfair labor practices, and that exception is expressly provided in Section 303 of the Act, 29 U.S.C. & 187, which authorizes suits for damages for violations of Section 8(b) (4), 29 U.S.C. § 158(b) (4). There are certain other situations in which courts are permitted to provide relief for conduct which may also be an unfair labor practice, but those are all situations in which the duty which the court is permitted to enforce is one which exists independently of the National Labor Relations Act, and which is not affected by the Act. Thus, state courts may remedy certain types of violations of state law even though the same conduct may be an unfair practice. E.g., United Automobile Workers v. Russell, 356 U.S. 634 (1958) (violence. United Constr. Workers v. Laburnum Corp., 347 U.S. 656 (1954) (violence); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (libel); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (violation of union constitution). Similarly, state or federal courts may remedy violations of a collective bargaining agreement, even though the conduct which constitutes that violation may also be an unfair labor practice. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). But there is no case in which this Court has ever held that a duty which is cre-It is significant that Carnon involved conduct which at the

Possible time the present case is reached for argument in this Court there may also be before the Court one or two cases coming from the Board involving the question of whether a violation of the duty of fair representation is an unfair labor practice. Two such cases have already been argued in the Pifth Circuit. Local 1367, International Loughboremen's Acr's, 158 N.L.R.B. 897 (1964). Local 12, United Rubber Workers, 150 N.L.R.B. 512 (1964). Should those cases reach this Court, and should the Court conclude, contrary to the view of the WIRE, that vibration of the duty of fair representation is not an enfair fabor practice, then the jurisdictional issue in the present case would disappear. Cf. Increst Steamship Co. v. International Maritime Workers Union, 572 U.S. 24, 27 (1965).

ated by the National Labor Relations Act, and which is enforceable by the National Labor Relations Roard, is also enforceable by a court. There is, in other words, no such thing as concurrent jurisdiction to remedy unfair labor practices as such, except for the single situation expressly provided for in Section 303.

It follows, therefore, that so long as the Board takes the view that violation of the duty of fair representation imposed by Section 9(a) of the Act is also an unfair labor practice under Section 8(b), the courts are precluded from taking jurisdiction of cases involving claimed violations of that duty. Since this is such a case, the court below should have dismissed it for lack of jurisdiction.

V. AN AWARD OF DAMAGES IS NOT IN ANY EVENT THE APPROPRIATE REMEDY FOR A UNIONS IMPROPER REFUSAL TO TAKE A GRIEVANCE TO ARBITRATION

The third question stated in the petition for certiorarishere is whether the proper relief in this suit was an award of damages based on the assumption that Owens' grievance would have been sustained if taken to arbitration or, to the contrary, an order requiring that the grievance be arbitrated. This question need not necessarily be decided in this case. It was not decided below and, although petitioners below did object to the trial court's assumption that Owen's grievance, if processed, would have been granted by an arbitrator (R. 169), no direct challenge to the appropriateness of an award of damages was made. Furthermore, this case is so clearly one in which no remedy at all is appropriate that any issue as to what the remedy should be if a case had been made out for a remedy is extremely hypothetical.

For these reasons, we have reserved for the end of this brief any discussion as to the question of whether a recovery in damages is proper even if the case be one in which it is

found that some relief should be granted. Despite our doubt as to whether decision on the question is necessary, we do feel it appropriate to present our views on this subject to the Court. We do so both because we raised it in our petition and because, as we have earlier indicated, we believe that this case should be decided in the context of the federal law governing the collective bargaining agreement and its administration. The question of remedy is certainly part of that context, and the nature of the remedy which will be granted is certainly of importance in determining the standard for intervention of the judiciary, or, for that matter, of the Labor Board.

Our view of the importance of the grievance procedure and of the necessity that a union be given authority to resolve and to settle grievances in that procedure does not by any means imply that where the union fails to act fairly or responsibly in performing that function the individual grievant should have no remedy. To the contrary, we concur in the view that the grant of union authority carries with it a fiduciary obligation for breach of which an appropriate remedy must be provided. The cases in which such a remedy would be appropriate are not only cases of ment discrimination but also cases in which it is clear, from that evidence, that the union is hostile to the grievant or indifferent to the merits of the grievance, or cases in which there is a showing of gross negligence on the part of the union in protecting his rights.

It does not follow, however, that the appropriate remedy in such cases is a suit for damages either against the union, as was sought in this case, or against the employer. Indeed, we believe that the principles which this Court has enunciated in the cases beginning with Lincoln Mills and which were most recently applied in Republic Steel v. Maddox, 379 U.S. 650 (1965) require quite a different solution.

In Maddox, this Court dealt at length with the importance of resolving grievances through the procedures pro-

vided in the collective agreement, rather than through litigation in the courts. The Maddox opinion acknowledged that, in Moore v. Illinois Central R. God 312 U.S. 630 (1941), the Court had held that under the Railway Labor Act an employee could bring suit for damages for a discharge alleged to be in violation of a collective bargaining agreement if the law of the state did not require exhaustion of remedies under the agreement. Subsequently the Court refused to apply this rule to any cases other than those in which the employment relationship had terminated Slocint v. Delaware L & W. R. Co., 339 U.S. 239 (1950) In Maddox, the Court was asked to extend the distinction between termination grievances and other grievances to the National Labor Relations Act. The Court not only refused to do so but raised scrious doubt as to whether a rule permitting damage suits in Railway Labor Act cases was consistent with the Court's later recognition in Machinists v. Central Airlines, 372 U.S. 682 (1963) that federal law, rather than state, governed such suits. It set forth at some length the reasons why permitting such a suit was incompatible with the federal labor policy and concluded that, as a matter of federal law, the grievant must at least attempt to use the grievance procedure before instituting suit, whatever the nature of his grievance.

We believe that the same considerations and the same reasoning upon which the Court relied in Maddex require that the remedy, where a grievant has attempted to exhaust the procedure and the union has wrongfully refused to handle his case, should be an order directing arbitration rather than a suit for damages.

There are two basic seasons why a suit for damages is not the appropriate remedy in a case of this kind, whether that suit be against the employer or the union. Let us deal first with the suit against the employer, such as the suit in Maddox. There is somewhat greater justification, it is true, for such a suit than for one against the union. The basic

the agreement. The failure of the union to process the grievance has barred the grievant from obtaining relief but it is fundamentally the employer, not the union, whose breach of contract has caused the grievant's harm and, therefore, it can be argued, the grievant should be permitted to sue it to recover his damage. This is the view which has been adopted by the Maryland Court of Appeals Jenkins v. Schluderberg-Kurdle Co., 217 Md. 556, 144 A.2d 280 (1958). This also was the view of this Court where it found that under the Railway Labor Act, the union attempted, without proper authority, to settle a grievance. Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945).

The first difficulty with such a suit, even as against the employer, is that in such a suit the plaintiff, in order to recover, must not only show an unjustified refusal by the union to press the grievance but also must try the grievance itself before the court. Such a result is squarely contrary to the principles established by this Court in United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1980) and reiterated in Maddox. As the Court said in American Manufacturing, "when the judiciary undertakes to determine the merits of a grievance... it usurps a function which is entrusted to the arbitration tribunal."

363 U.S. at 569. This is as true, we submit, where judicial determination occurs as a result of the failure of the union to process a grievance as when it occurs under the guise of interpreting the arbitration provision.

In Maddox, the Court said that it was in the upon's interest to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions as whether the company has determined to close permanently." [Or we might add; whether an employee was discharged for just cause."] 379 U.S. at 656. It is equally, we assume in the employee's interest. The em-

ployer as well as the union has bargained for an arbitrator's judgment, and it is inappropriate to subject either to the decision of a court, even if the failure to use the arbitration process is a result of the union's dereliction.

There are other reasons, not present in Maddox, why the remedy of a suit for damages is inappropriate. In Maddox, the relief which could be granted in such a suit was substantially the same as would presumably have been granted by an arbitrator if the individual's claim had been sustained. But in other cases this is frequently not true. Under the regime normally contemplated by a collective bargaining unit, damages are normally not awarded. This is clearest in cases such as this one, involving a claimed wrongful termination of employment. Arbitrators do not award damages in such cases. The usual remedy is reinstatement with back pay, a remedy with consequences far different, both to the plaintiff and to the defendant, than a damage suit which may encompass prospective carnings for the period of the employee's life expectancy.

Nichols v. National Tube Co., 122 F. Sapp. 726 (N.D. Ohio, 1954), provides a nice illustration. In employee was compulsorily retired. He brought suit against his employer claiming that this constituted an impermissible discharge under the collective bargaining agreement. The direct court entertained the suit, found that compulsory retirement was contrary to the collective agreement and entered judgment for the individual plaintiff in the sum of \$25,000, based on his life expectancy. The court of appeals reversed on the ground that, as it construed the agreement and the collective bargaining history, the company had the right to retire the plaintiff. United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956).

[&]quot;For a more extended discussion of this point, see Feller, "Remodies in Arbitration" in Labor Arbitration Perspectives and Problems, Proceedings of the Seventeenth Americal Meeting, National Academy of Arbitrators (BNA) 1964) pp. 1958 ff. 104 minds because of

It is submitted that both courts were wrong in Nichols, not only because the employee had not first attempted to utilize the grievance procedure as Maddox now requires, but also because they decided questions reserved for arbitration and awarded a remedy different than that contemplated by the collective bargaining agreement.

What we have said about a suit against the employer applies with equal, and indeed, greater force to a suit against the union. The underlying contract violation, as we have said, is by the employer. And the remedy obtainable in a suit against it is perforce different than that which an arbitrator would award. In a discharge case it is simply not within the power of the union to reinstate the grievant. Nor can the union provide a promotion, in a seniority case, or a rate adjustment in a job classification case.

For all of these reasons, we believe that the appropriate remedy where a union has violated its duty in failing to take a grievance to arbitration is not a damage suit against either the union of the employer but an order directing that the grievance be arbitrated. Such an order will provide both the proper forum and the proper relief. The suit should be brought against both the union and the company. The order should be directed against both and should provide such safeguards as may appear appropriate (including the right of individual representation) to insure that the individual's case is fairly presented.

One of the objections to this remedy is that in the typical case (although not in this one because the grievance was in a "hold" posture by agreement when the suit was filed) the time limits set forth in the grievance procedure for taking a case to arbitration would have long expired before any court could determine that the union improperly failed to invoke that procedure. Requiring arbitration, therefore, might impose upon the employer greater burdens than he had contracted to assume, particularly in a case involving a potential claim for back pay. The appropriate solution

to this problem, we believe, would be to order arbitration, without regard to time limits on the theory that, if the employer has violated the contract, he should not be relieved of responsibility because of the union's dereliction. But, by the same standard, his responsibility should not be increased. Accordingly, any order directing arbitration should provide that any costs, such as increased back pay if the grievance should be sustained, imposed upon the employer by the union's initial failure to process the grievance to arbitration should be recoverable against the union.

Such a remedy, we believe, appropriately preserves the rights of the grievant, the union and the employer, and the federal labor policy. Adjudication is had in the forum which the parties had agreed upon. The remedy to be provided is the remedy normally provided in such a forum, not the very different recovery which may be entailed in a suit for damages. The employer is saddled with no greater obligation than that which he assumed under the collective bargaining agreement. And the union is taxed with damages for its own breach, which is not the breach of the collective bargaining agreement, but the breach of its duty to present the claim that such breach occurred. Such a remedy should be available, we believe, not in every case in which the union has refused to process the grievance for that would substantially undermine the union's necessary authority to settle grievances but in those cases in which a court finds that the union has violated its duty of fair representation.

In this case, Owens did sue both the union and the employer. But he sued them separately. And in each suit he asked, not for the arbitration to which he claimed

¹⁰ In January, 1961, Owens filed suit against the employer, seeking damages for his discharge. Owens v. Swift & Co., No. 631293, Circuit Court of Jackson County, Missouri. The suit is still pending by stipulation of the parties that it be continued until the appeal in the present case is determined.

he was entitled, nor for the remedy of reinstatement with back pay which an arbitrator might have awarded him, but for damages. Both suits, we submit were improper under the governing federal law, and the judgment obtained in this one should be reversed. And Brahenes ourse with and

CONCLUSION TELL Shiron bloom For the reasons stated, the judgment of the court below should be reversed. The list belong a notice of the state of the

door to expension should be recoverable against the union. Respectfully submitted. HENRY A. PANETHIERE RUSSELL D. JACOBSON 1700 Home Savings Building 1006 Grand Avenue Kansas City, Missouri 64106

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Constitutional and Statutory Provisions Involved

Article I, Section 8 of the Constitution provides, in per-

"The Congress shall have Power . . . To regulate Commerce . . among the several States . . ."

Article VI, cl, 2, of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)."

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958), provides, in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) To restrain or coerce (A) employees in

the exercise of the rights guaranteed in section 7:

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, ..."

Section 9(a) of the National Labor Relations Act, 61 Stat. 143 (1935), as amended, 29 U.S.C. § 159(a) (1958), provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect? Provided further. That the bargaining representative has been given opportunity to be present at such adjustment."

Section 10(a) of the National Labor Relations Act, 49

Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958), provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Cases—Continued
Ford Motor Co. v. ell oficera,

INDEX

and the second of the second of the second	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument:	
Introduction and summary	6
I. Since the conduct alleged in the complaint	
would arguably constitute an unfair	
labor practice and did not entail a	
breach of a collective bargaining con-	
tract, the Garmon rule (359 U.S. 236)	
precluded the State court from enter-	
taining the action	15
II. Assuming that the State court had jurisdic-	
tion to enforce the union's duty of fair	4
representation, the judgment is not con-	1
sistent with the governing federal stand-	A
ards	23
Conclusion	29
Appendix A	30
Appendix B	32
Cases:	*
Brotherhood of Railroad Trainmen v. Howard,	
343 U.S. 768	9
Cargo Handlers, Inc., 159 NLRB No. 17	10
Conley v. Gibson, 355 U.S. 41	.12
Donnelly v. United Fruit Co., 190 A. 2d 825	26

ases—Continued	Page
Ford Motor Co. v. Huffman, 345 U.S. 330	8, 9,
	14, 25, 27
Garner v. Teamsters Union, 346 U.S. 485	
Humphrey v. Moore, 375 U.S. 335	8,
9, 10, 14,	
Independent Metal Workers Union, Local No.	
(Hughes Tool Co.), 147 NLRB 1573	
International Assn. of Machinists v. Gonzale	
2이 많은 경기 경계에 가장 경기 경기 경기 경기 되었다면 되었다면 하는 것이 되었다면 하는데	6, 17, 18
Linn v. Plant Guard Workers, 383 U.S. 53	
Local 12, United Rubber Workers (The Busine	
League of Gadsden), 150 NLRB 312	
Local 20, Teamsters v. Mo. on, 377 U.S. 252	
Local 24, Teamsters v. Oliver, 358 U.S. 283_	
Local 100, United Assn. of Journeymen	
Apprentices v. Borden, 373 U.S. 690	10,
a Lamber med inter- siere our so als 13,	
Local 174, Teamsters v. Lucas Flour Co	
369 U.S. 95 Lreavening attred and during	24
Local 1367, ILA (Galveston Maritime Associ	a-
tion), 148 NLRB 897	
Miranda Fuel Co., 125 NLRB 454	
Miranda Fuel Co., 140 NLRB 181 10, 1	
National Labor Relations Board v. Mirand	
Fuel Co., 326 F. 2d 172	10
Ostrofsky v. United Steelworkers, 171 F. Sup	p. SubudA
782, affirmed, 273 F. 2d 614, certions	
denied, 363 U.S. 849	. 7
Republic Steel Co. v. Maddox, 379 U.S. 650	10. 24
San Diego Building Trades Council v. Garmo	
359 U.S. 236 14, 15, 16, 17, 18, 19, 2	
Smith v. Evening News Ass'n.; 371 U.S. 195	_ 19, 20
Steele v. Louisville & Nashville R.R., 323 U.	
198 SC 18 4 00 C 20 C 18 SC 18 SC 19 SC	9, 10
B () :	

Cases—Continued hauttined hauttined	iM.
On THE OPEN THE COME AND ADDRESS OF THE OPEN THE	Page
223 F. 2d 739	- 9
Textile Workers v. Lincoln Mills, 353 U.S. 448.	24
Tunstall v. Brotherhood of Locomotive Firemen	-
& Enginemen, 323 U.S. 210	9
United Steelworkers v. Warrior & Gulf Navi-	
gation Co., 363 U.S. 5747	, 12
Wallace Com vy National Labor Relations	
	, 10
Statutes:	
National Labor Relations Act, as amended	. >
(61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151,	
 See St. Michael (River) 13, 13-144. Monthly Manager (1994) 1991. 	
Section 7 7 11, 12, 15	, 30
Section 810, 13	, 30
Section 8(a)(3)	30
Section 8(a)(5)	. 7
Section 8(b)(1) 11, 17	, 30
Section 8(b)(2)	31
Section 8(b)(3)7, 11	, 31
Section 8(d)11 Section 9	, 31
Section 9	12
Section 9(a) 6, 9, 11	, 31
Section 10	10
Labor Management Relations Act (61 Stat.	
136 et seq., 29 U.S.C. 141 et seq.):	
Section 1	12
Section 30119	, 22
Civil Rights Act of 1964 (78 Stat. 241 et seq.):	00
Section 703(c) (42 U.S.C. 2000e-2(c))	22
Section 706(f) (42 U.S.C. 2000e-5(f))	22
Miscellaneous:	
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In the Supreme Court of the United States

The judgment of the Supreme Court of Missensi

OCTOBER TERM, 1966

No. 114

MANUEL VACA, ET AL., PETITIONERS

v.

NILES SIPES, ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of June 6, 1966 (384 U.S. 969), inviting the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The order of the Circuit Court of Jackson County, Missouri, granting a motion to set aside the verdict (R. 171) is unreported. The opinion of the Kansas City Court of Appeals (R. 193-201) is reported at 59 LRRM 2165. The opinion of the Supreme Court of Missouri (R. 205-218) is reported at 397 S.W. 2d 658.

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JUBIBDICTION

The judgment of the Supreme Court of Missouri was entered on December 13, 1965 (R. 204). A timely petition for rehearing was denied on January 10, 1966 (R. 218). On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966 (R. 219). The petition for certiorari was filed on April 29, 1966, and was granted on June 6, 1966 (R. 220; 384 U.S. 969). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

A union, which is the exclusive representative of the employees of an employer subject to the National Labor Relations Act, processed the grievance of a discharged employee through the first four steps of the contract grievance procedure, but declined to take the grievance to the final step, arbitration, because it believed that the grievance lacked merit. Alleging that the union had acted arbitrarily and unfairly in failing to press the grievance to arbitration, the employee sought and recovered compensatory and punitive damages in a State court action against union officials. The United States, as amicus curiae, will discuss the following questions:

- 1. Is the subject matter of the action within the exclusive primary jurisdiction of the National Labor Relations Board?
- 2. If the State court has jurisdiction, does federal law authorize an award of compensatory and punitive damages if there was any reasonable basis for the union's allegedly unfair conduct, absent proof of hostile motive or fraud?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are set forth in Appendix A (pp. 30-31, infra).

STATEMENT

Owens (respondent's decedent) was employed as a beef cutter (a job requiring him to lift heavy sides of beef) by Swift & Company under a collective bargaining agreement with the union (United Brotherhood of Packinghouse Workers) of which petitioners are officers. The contract provided for a five step grievance procedure. When Owens was discharged by Swift in January 1960, on the ground that he was not physically fit, Owens called upon the union to invoke that procedure (R. 23-25). Between January and November 1960, the union carried Owens' claim that he had been improperly discharged through the first four steps of the grievance procedure without obtaining reinstatement (R. 27-29, 50-55, 86-89, 104-106, 134-136). At these meetings, which involved persons of progressively higher authority in the management hierarchy (R: 174-176), the union urged that Owens was able to work and should be reemployed (R. 186, 188, 190). The union took that position in reliance on statements which Owens had obtained at the union's request from a number of doctors (R. 18, 28, 46). Swift, on the other hand, relied on other medical reports to the contrary (R. 104-105, 121-124, 135-

Owens died while his appeal to the Kansas City Court of Appeals was pending; Sipes, the administrator of his estate, was substituted as appellant (R. 202).

136, 145, 186, 188). Before proceeding to the fifth step arbitration—the union asked Owens to go to a doctor of his own choosing for a thorough examination at the union's expense (R. 56-57, 107, 116). Owens was then examined by Dr. Hughes W. Day, a heart specialist, who reported that Owens had "hypertensive heart disease" and that he was "not able to work" (R. 187). After receiving the report the union declined to press Owens' grievance to arbitration and subsequently abandoned the claim (R. 81, 106-109, 125-126, 138, 139). In February 1962, Owens commenced this action in the Circuit Court of Jackson County, Missouri, alleging that the union officers had declined to pursue his claim "arbitrarily, capriciously and without just or reasonable reason or cause" (R. 4). He sought \$7,000 compensatory damages and \$3,000 punitive damages.

The jury heard testimony that the union did not take Owens' grievance to arbitration because of Dr. Day's adverse report and the lack of sufficient favorable medical evidence, and that ultimately, in May 1964, the grievance was withdrawn because there were no new developments since Dr. Day's examination (R. 81, 106–107, 108–109, 138, 139). However, Owens testified that, when he asked Manuel Vaca, president of the Local, to take the grievance to arbitration, Vaca said the union would do so if Owens would give him \$300 for the cost of arbitration (R. 29–30, 79–81, 154). Vaca, on the other hand, denied asking Owens for any money (R. 126). Owens also testified that, since his discharge, he had done various strenuous jobs and that he felt well (R. 31–36, 73–74).

The trial court, denying petitioners' motion for a directed verdict (R. 158), instructed the jury, interalia, to find for Owens if Swift's assertion of Owens' physical inability to work was "false and wrongful in that it was not based on fact" (R. 160), and if petitioners "arbitrarily " " and without just cause or excuse" refused to carry Owens' grievance to arbitration (R. 161). On the other hand, the jury was instructed to find for petitioners if they acted "reasonably and in good faith," or did not aet "maliciously, arbitrarily, wantonly, or wrongfully" (R. 162). Finally, the court instructed that; if the jury found these issues for Owens, then he should be compensated "for any actual damages * * * by loss of work" caused by petitioners (R. 161); and, if they caused such actual damages by conduct that was "willful, wanton and malicious," the jury might award Owens "an additional amount as punitive damages, in such sums * * * [as] will * * * punish defendants and * deter them and others from like conduct" (R. 162). The jury returned a verdict for Owens, awarding him \$7,000 actual, and \$3,300 punitive, damages (R. 165).

The trial court granted petitioners' motion to set aside the verdict, on the ground that the conduct of the union was arguably protected by the National Labor Relations Act, and thus within the exclusive primary jurisdiction of the National Labor Relations Board (R. 171). The Kansas City Court of Appeals affirmed (R. 193–201).

The Supreme Court of Missouri reversed. It held that the cause was not preempted, for Owens was not

complaining about discrimination in employment, but about an internal union matter, i.e., "the refusal of the union to fully process his grievance"; accordingly, the State court had jurisdiction under International Assn. of Machinists v. Gonzales, 356 U.S. 617 (R. 215—216). The Supreme Court of Missouri further held that, in light of the evidence that Owens had obtained reports from a number of doctors stating that he was able to work and his testimony that he had engaged in hard work subsequent to his discharge, the jury could reasonably find that petitioners had acted in bad faith in refusing to carry Owens' grievance to arbitration (R. 216–217).

INTRODUCTION AND SUMMARY

Respondent claims that the union violated its duty fairly to represent Owens when it declined to take his grievance against Swift to arbitration. The case raises the important question of the proper forum and the source of law for the adjudication of such claims. Neither the complaint nor the opinions of the State courts characterized the legal nature of the claim nor identified the source of the applicable legal standards. However, it seems apparent that the conduct complained of emerges from relationships created by and deeply enmeshed in federal law. Analysis appropriately begins with those relationships.

The union was the exclusive representative of Owens and his co-workers for purposes of collective bargaining with Swift by virtue of Section 9(a) of the National Labor Relations Act (29-U.S.C. 159(a)). The agreement between Swift and the union establishing

the grievance procedure resulted from the performance by each of their duty to engage in collective bargaining, imposed by Sections 8(a)(5) and 8(b)(3) of the Act. It effectuated the employees' right "to bargain collectively through representatives of their own choosing" guaranteed by Section 7 of the Act and the federal policy "to promote industrial stabilization through the collective bargaining agreement." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578. Moreover, the grievance procedure thus adopted is itself "a part of the continuous collective bargaining process"; indeed, "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." Id. at 581.

The processing of grievances is commonly one of the principal functions of a union. Through the grievance machinery the inevitable gaps in the collective bargaining agreement are filled in, precedents are developed and the "common law of the plant" is created. The union's handling of a grievance is plainly fraught with significance not only for the aggrieved employee but also for all the other employees in the bargaining unit, the union itself, the employer, and thus for the health of industrial self-government and the industrial stability which Congress sought to foster. Moreover, it has been widely recognized that the utility of the grievance procedure depends very

^{*}See Cox, Rights under a Labor Agreement, 69 Harv. L. Rev. 601 (1956), Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955). See, also, Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md.), affirmed, 278 F. 2d 614 (C.A. 4), certiorari denied, 363 U.S. 849.

largely on the ability and willingness of the union "to sift out and reject, through investigation and the grievance machinery steps preliminary to arbitration, those employee complaints which lack substance." If the machinery is to work, unions must be free, as this Court has recognized, "to sift out wholly frivolous grievances which would only clog the grievance process" and "to take a position on the not so frivolous disputes." Humphrey v. Moore, 375 U.S. 335, 349.

Important as the union's exercise of judgment and discretion is in the processing of grievances, such discretion cannot be permitted to cloak arbitrary decisions that run roughshod over the rights and legitimate interests of the employees for whom the union is the statutory bargaining agent. This Court has held that "[t]he undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." Id. at 342; Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338. Moreover, the Court has recognized that the duty of fair representation, and the corresponding right to be fairly represented, derive from the National Labor Relations Act in light of the "principle" of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in

Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 Boston Coll. Ind. & Com. L. Rev. 783, 789, (1966). See, also, Ross, Distressed Grievance Procedures and their Rehabilitation, National Academy of Arbitrators, Proceedings, 16th Annual Meeting, 104, 107 (1963). See also note 2, supra.

their interest and behalf * * *" (Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202). Syres v. Oil Workers Union, 350 U.S. 892, reversing 223 F. 2d 739 (C.A. 5); Ford Motor Co. v. Huffman, 345 U.S. 330; Wallace v. Labor Roard, 323 U.S. 248, 255; Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957). Cf. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768.

The scope of the duty of fair representation imposed by the Act is measured by federal standards which inevitably reflect the competing duties also imposed by the Act. The union established as the exclusive bargaining agent under Section 9(a) is an agent bound to serve numerous principals. "Conflict between employees represented by the same union is a recurring fact." Humphrey v. Moore, 375 U.S. at 349-350. "The complete satisfaction of all who are represented is hardly to be expected." Ford Motor Co. v. Huffman, 345 U.S. at 338. If collective bargaining is to function at all, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ibid. Accordingly, the Court has declined to find a breach of the union's duty of fair representation unless there is "substantial evidence of fraud, deceitful action or dishonest conduct," or other evidence that the union's position, though "contrary to that of some individuals whom it represents," is not taken in good faith. Humphrey v. Moore, 375 U.S. at 348-349. Whatever the

precise configuration of the union's duty, the important principle is that it cannot be ascertained without reference to the complex of legal and practical factors at work in the collective bargaining process under federal law.

National Labor Relations Act generally constitutes an unfair labor practice (under Section 8) which the Labor Board is empowered to remedy (under Section 10), the Board, building on the reasoning of Steele, and Wallace, supra, has held that a violation of the duty of fair representation constitutes an unfair labor practice which the Board has jurisdiction to remedy. In a series of recent cases beginning with Miranda Fuel Ca., 140 NLRB 181 (1962) the Board has ruled that the employee's right "to bargain collectively through [his] representatives," guaranteed

phicy v. Moore, 375 U.S. at 348-349. Whatever the

The other cases are: Independent Metal Workers Union. Local No. 1 (Hughes Tool Co.), 147 NLRB 1573; Local 1367, ILA (Galveston Maritime Association), 148 NLRB 897; Local 12, United Rubber Workers (The Business League of Gadsden), 150 NLRB 312; Cargo Handlers, Inc., 159 NLRB No. 17. The Galveston and Gadsden cases are presently pending before the Court of Appeals for the Fifth Circuit, on petitions for enforcement and review of the Board's orders. The Board's decision in Miranda was denied enforcement by the Court of Appeals for the Second Circuit (Judge Friendly dissenting), but only one judge found it necessary to reach the fair representation issue. National Labor Relations Board v. Miranda Fuel Co., 326 F. 2d 172 (C.A. 2). Similarly, this Court has thus far refrained from deciding whether breach of the duty of fair representation is angunfair labor practice. See Republic Steel Co. v. Maddox, 379 U.S. 650, 652; Humphrey v. Moore, 375 U.S. 335, 344; Local 100, United Assn. of Journeymen & Apprentices v. Borden, 373 U.S. 690, 696, n. 7.

by Section 7, necessarily embraces the union's duty of fair representation derived from Section 9(a). That is to say, unless employees are "free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," their Section 7 right is materially impaired. Miranda Fuel Co., 140 NLRB 181, 185. cordingly, a union that arbitrarily refuses to process grievances for employees, or otherwise fails fairly to represent them in collective bargaining, restrains such employees in the exercise of their Section 7 right to be fairly represented. Such action, therefere, violates Section 8(b)(1)(A); which makes it an unfair labor practice for a labor organization to "restrain or coerce " " employees in the exercise of the rights guaranteed in section 7."

Further, in cases following Miranda the Board has also held that a union that unfairly represents an employee violates its duty to bargain collectively imposed by Sections 8(b)(3) and 8(d) of the Act. Section 8(b)(3), read in conjunction with Section 8(d), imposes a duty on the statutory representative which runs not only to the employer, but to the employees in the unit as well, and that duty contemplates.

Section 8(b) (3) prevides that "[i]t shall be an unfair labor practice for a labor organization or its agents " to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. " " "

that the union will bargain lawfully with the employer. As the Board stated in Local 1367, ILA (Galveston Maritime Association), 148 NLRB 897, 899: "Section 8(d) speaks, inter alia, of a mutual obligation of employers and unions 'to confer in good faith' and to sign 'any agreement reached.' These quoted phrases contemplate " " only lawful bargaining and agreements, for the statute does not sanction the execution of agreements which are unlawful." Since Sections 7 and 9 of the Act impose a duty of fair representation, a union has not engaged in lawful bargaining where, either through entry into an agreement or its administration, it violates that duty. See Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.), 147 NLRB 1573, 1577, 1604; Local 12, United Rubber Workers (Business League of Gadsden), 150 NLRB 312. See, also, Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 172-174 (1957). In thus affording sanctions for breach of the duty of fair representation, the Board's Miranda doctrine effectuates the purpose and policy of the Labor Management Relations Act not only "to promote the full flow of commerce," but also "to protect the rights of individual employees in their relafloris with labor organizations" (29 U.S.C. 141 (b)).

From the foregoing it is evident that Owens' cause of action (1) is predicated on conduct proscribed by federal labor law, (2) is necessarily measured by fed-

The processing of grievances is part of the bargaining function. See United Steelworkers v. Warrior & Gulf Navigation. Co., 363 U.S. 574, 581; Conley v. Gibson, 355 US 41, 46.

eral standards derived from a complex of countervailing policies, and (3) is potentially enforcesble before the National Labor Relations Board. Because Owens' claim is directed precisely to the conduct of the union's role in the collective bargaining process, we think that these factors demonstrate that it falls within the area that Congress has subjected to comprehensive regulation and which is therefore wholly preempted by federal law. These considerations also suggest that the prospect of variant judicial interpretations of the duty of fair representation is likely to have a serious inhibitory effect on the proper functioning of unions as statutory bargaining agents and, therefore, a high potential for conflict with national labor policy. The realization that every compromise negotiated and every claim relinquished by a union in the collective bargaining process is potentially subject to scrutiny for unfairness by a judge and jury inexperienced in the realities of industrial relations hardly seems conducive to responsible union representation. Unless such scrutiny is informed by an extensive familiarity with the nature of the bargaining process and the legitimate objectives of the union, prudence may well dictate that every grievance be pressed to arbitration. We think that these considerations "point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency." Local 100, United Assn. of Journeymen & Apprentices v. Borden, 373 U.S. 690, 695-696.

We show below that these conclusions, predicated on the practicalities of the problems involved, are supported by the prior decisions of this Court effectuating national labor policy in the context of our federal system. We first urge that under the rule announced in San Diego Building Trades Council v. Garmon, 359 U.S. 236, exclusive jurisdiction to regulate the conduct complained of has been preempted by the Board. In light of Garmon and subsequent decisions, we show that the State court is precluded from entertaining this action because it entails the regulation of conduct (1) that is arguably protected or prohibited under the National Labor Relations Act, (2) that is of more than peripheral concern to federal labor law, (3) that does not touch interests deeply rooted in local feeling and responsibility, and (4) that does not constitute a breach of a collective bargaining contract. Alternatively, we urge that, if the State court had jurisdiction, the judgment is inconsistent with governing federal standards enunciated in Ford Motor Co. v. Huffman, 345 U.S. 330, and Humphrey v. Moore, 375 U.S. 335. We contend that under those standards, which recognize that a wide range of reasonableness must be allowed the exercise of union discretion in the collective bargain process, absent affirmative evidence of hostile motive or fraudulent or deceifful conduct, liability may not be imposed where, as here, there is reasonable basis for the union's allegedly unfair. Journeymen & Apprentices vickorden, 313 11 toubago mary jurisd thou of the Theor Board is confirmed by

SINCE THE CONDUCT ALLEGED IN THE COMPLAINT WOULD ABGUABLY CONSTITUTE AN UNFAIR LABOR PRACTICE AND DID NOT ENTAIL A BREACH OF A COLLECTIVE BARGAINING CONTRACT, THE GARMON RULE (359 U.S. 236) PRECLUDED THE STATE COURT FROM ENTERTAINING THE ACTION

As we have shown (supra, p. 4), the complaint alleged in substance that the union had unfairly represented Owens by refusing, for arbitrary and malicious reasons, to carry his grievance to arbitration. Such conduct, if proved, would constitute not only a breach of the union's duty of fair representation under the National Labor Relations Act, but also an unfair labor practice under Section 8 of the Act (supra, pp. 10-12). On the other hand, if it were found that the union had in fact act of reasonably in refusing to proceed to arbitration, its conduct would fall within the protection of Section 7 of the Act (see supra, pp. 9, 12 n. 6). In these circumstances, the exclusive pri-

Respondent states (Br. in Opp., p. 7; see pp. 4-5) that the Board declined to take jurisdiction of Owens' claim against the union. He bases this statement on a letter from one of the Board's regional offices to counsel for Owens (and for respondent), a portion of which is set forth in the opinion of the Kansas City Court of Appeals (R. 195-196). We annex the entire letter as Appendix B hereto (pp. 32-33, infra). The letter does not support respondent's assertion that the Board declined to take jurisdiction of the claim which is the basis of the present action; indeed it has no relevance to the claim that the union violated any duty in failing to press his grievance to arbitration. The letter is dated September 16, 1960—two months before the fourth step meeting was held (see R. 110-111; 185; 189-190) and, therefore, long before the question of proceeding to the fifth step arose.

mary jurisdiction of the Labor Board is confirmed by San Diego Building Trades Gouncil v. Garmon, 359 U.S. 236. The Court there held (at 245):

When an activity is arguably subject to \$7 or \$8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

The considerations which underlie the Garmon preemption doctrine are fully applicable here. As the Court explained in Garner v. Teamsters Union, 346 485. 490-491: "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible and conflicting adjudications as are different rules of substantive law. State court application of the highly generalized federal standard of fair representation leaves very substantial room for divergent application and affords no promise of a consistent and harmonious development. Phirefore, absent a requirement that such cases be presented to the Board in the first instance, there is a real danger that "a variety of local procedures and attitudes * [would] produce incompatible and conflicting adjudications." Garner; supra.

Since at very least "it is reasonably arguable' that the matter comes within the Board's jurisdiction" (Borden, supra, at 696), the Garmon principle is applicable unless the present case falls within one of the exceptions which Garmon recognized were imposed by a "due regard for the presuppositions of our embracing federal system" (359 U.S. at 243). Thus the Court has declined to find preemption applicable (1) "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act" and (2) "where the regulated conduct touched interests " deeply rooted in local feeling and responsibility" (id. at 243-244),

As to the first exception, a union's engagement in, or refusal to engage in, collective bargaining on behalf of an employee is clearly at the very core of the system of rights and duties created by the Labor Managment Relations Act, Such conduct can, therefore, hardly be regarded as of "merely peripheral concern." In this respect the present case is quite unlike the suit for the restoration of union membership involved in International Assn. of Machinists v. Gonzales, 356 U.S. 617, which was cited in Garmon (at 243) as illustrative of a matter of only peripheral concern, and upon which the Supreme Court of Missouri relied in the present case. In Gonzales it was recognized that, in view of the refusal of Congress to regulate "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein" (Section 8(b)(1)(A) proviso), State law was free to regulate such rights and that "the comprehensive relief of equity" might

ages for loss of wages and suffering (356 U.S. at 620-621): The decision in Gonzales, therefore, "turned on the Court's conclusion that the lawsuit was focused on purely internal union matters: " and that the principal relief sought was restoration of union membership rights." Local 100, United Asia of Journeymen & Apprentices v. Borden, 373 U.S. at 697. Here, on the other hand, respondent's claim is addressed to the manner in which the union participates in collective bargaining with the employer. The inevitable effect of the decision below is to regulate such participation.

Nor is respondent's claim addressed to conduct touching interests "deeply rooted in local feeling and responsibility"—the second exception recognized in Garmon (359 U.S. at 243). That category was held to ambrace "conduct marked by violence and imminent threats to the public order? (359 U.S. at 247; see also, id. at 248, n. 6). It also includes the verbal violence entailed in malicious defamation. Line v. Plant Guard Workers, 383 U.S. 53, 62. The union's

In Lines, although the Board could offer no remedy at all for the injury to reputation caused by libal, the Court was careful to minimize the possibility of interference with effective administration of national labor policy. It therefore limited the availability of State remedies "to those instances in which the complainant can show that the defamistory statements were circulated with malice and caused him damage." 383 U.S. 58, 64-65. Here, unlike Line, the Board can redress the injury done to the individual. See, e.g., Local 18, United Publics Workers (The Business League of Guideles), supra, 150 NLRB at 322, 328 (union ordered to proceed to arbitration claims of unfairly treated grievants); Miranda Ruel Go., Inc., supra, 140 NLRB at 186, and 125 NLRB 454, 455 (ordering restoration

refusal to insist on the arbitration of Owens' grieved ance, however that conduct may be described, plainly does not have the characteristics of this category. Far from having deep local roots, the interests here affected are almost wholly the creation of federal law.

Finally, in his brief in opposition (pp. 1, 5), respondent for the first time seeks to present his case as one for the union's breach of a collective bargain; ing contract and therefore within the concurrent jurisdiction of the State court recognized by Section 301 of the Labor Management Relations Act (29 U.S.C. 185). See Smith v. Evening News Assn., 371 U.S. 195. This claim has no support in the record. Neither the complaint (R. 1-6) nor any of the opinions below (R. 193-201; 203; 205-218) in any way suggests that the action is for breach of contract. The omission is not fortuitous. So far as appears, nothing in

of job rights and back pay where employer was guilty of "according to union's" unfair treatment). The fact that the State may be able to provide more extensive relief than the Board, e.g., punitive damages, does not militate against preemption. See Boarden, swara (reversing State court award of damages for loss of both past and prospective earnings). Indeed, where, as here, the conduct is subject to regulation by the Board as an unfair labor practice, the conflict inherent in the provision of State law remedies unavailable to the Board strongly supports the argument for preemption. See Garman, supra at 246-247.

Although the complaint alleged (R. 8) that Swift discharged Owens in violation of the seniority and discharge for cause provisions of the contract, the suit is not against Swift but only against the union. A separate action against Swift is pending in the State court (Pet. 17). Moreover, it is not suggested that the union's alleged violation of its duty of fair representation caused Swift to violate the contract. Owens testined (R. 40) and the court below found (R. 215) that the union had nothing to do with Owens discharge (see infra, pp. 26-27).

the collective bargaining contract between the union and Swift (R. 173-178) imposes upon the union any duty to take prievances to arbitration the duty that the union is alleged to have violated. On the contrary, the grievance procedure set forth in the contract (R. 174-176) provides that "[i]f not settled in the fourth step, then the National Union may refer the grievance to Cabriel N. Alexander as Arbitrator" (R. 176; emphasis added). The duty of fair representation derives from federal labor law and governs the collective bargaining process (see pp. 8-12, supra). In respondent's contention that the duty is imposed by the collective bargaining contract lurks the implausible assumption that the duty can be waived by the contracting parties. While the contract can undoubtedly reaffirm the duty of fair representation imposed by law, it cannot successfully disaffirm it. In any event, the present contract did neither.

The absence of any basis for a claim for breach of the collective bargaining contract is more than a technical flaw in respondent's argument for concurrent jurisdiction. In Smith, supra, the Court held that the Garmon rule was inapplicable to a suit by an employee against his employer for breach of a contract clause prohibiting discrimination against employees on account of union activity, even though the employer's conduct also constituted an unfair labor practice within the jurisdiction of the Labor Board. We there urged, as amicus curiae, that the jurisdiction of the State court be upheld in light of the

fundamental differences between the collective bargaining agreement, on the one hand,

ep. 26-27).

and State statutes and tort law on the other, as sources of enforceable rights and obligations. The latter are rules devised by government and imposed countryly upon the parties from without. By contrast, the standards of conduct prescribed by the collective bargaining agreement are self-imposed and are shaped to the particular needs and circumstances of the enterprise whose industrial life they govern. Because these obligations are voluntarily assumed, their enforcement by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another government body attempts to impose restraints which were not bargained for. " [Smith v. Evening News Assn., No. 13, Oct. Term 1962, Brief for the United States as Amicus Curiae, pp. 13-14.1

Here, too, were there a contractual standard in the formulation of which the union had participated and to which the union had assented, there could be no sound objection to the State court's assertion of jurisdiction. It is precisely the absence of such a standard, generated by those most familiar with the needs and circumstances of the affected plant or industry, that makes the invocation of the Labor Board's expertise most appropriate and enhances the danger of conflict between court-created rules and national labor policy. Accordingly, there is no inconsistency between our position here and the Court's decision in Smith v. Evening News Assn.

Likewise there is no inconsistency with the jurisdiction established under the Civil Rights Act of 1964 (78 Stat.

The situation here is also distinguishable from that in Humphrey v. Moore, 375 U.S. 335. There, the Court (by a closely divided vote) held that a State court had jurisdiction under Section 301 of an employee's suit against both the employer and the union to enjoin implementation of an agreement for dove-tailing senjority which was allegedly violative of the collective bargaining agreement and the result of dishonest union action. In that case there was some basis for concluding that the union's alleged breach of its duty of fair representation had caused the alleged contract violation by the employer. Here, on the other hand, the union's alleged unfair action did not cause, but occurred after, the alleged contract breach by Swift (see supra, pp. 3, 19 n. 9). Accordingly, this

241, 253, Sec. 701 et seq.). Section 705(s) of that Act (42 U.S.C. 2000c-2(c)) makes it "an unlawful employment practice" for a labor organization to discriminate against any individual because of his race, color, religion, sex, or national arigin. Section 706(f) (42 U.S.C. 2000c-5(f)) gives the United States district courts jurisdiction of private suits for injunctive and other relief against such practices. Since there is no legitimate union interest in such discriminatory practices and Congress has flatly prohibited them, there is little likelihood that judicial determinations will conflict with national labor policy.

The employer acted pursuant to the decision of the joint simployer union grisvance committee established under the collective agreement. As the Court pointed out (375 U.S. at 343): "No fraud is charged against the employer; but except for the improper action of the union, which is said to have domainted and brought about the decision it is alleged that Decision (the employer) would have agreed to retain its even employees. The fair inference from the complaint is that the employer considered the dispute a matter for the union to decide out of the union of

case, unlike Humphrey, cannot reasonably be viewed as one, to enforce the collective bargaining agreement, but only as one to enforce the union's duty of fair representation imposed by the National Labor Relations Act.

ASSUMING THAT THE STATE COURT HAD JURISDICTION TO ENFORCE THE UNION'S DUTY OF FAIR REPRESENTATION, THE JUDGMENT IS NOT CONSISTENT WITH THE GOVERNING FEDERAL STANDARDS

that doctrines of local We have urged (supra, pp. 8-12) that the duty of fair representation is one derived from the federal regulatory scheme as a corollary of the union's statutory status as exclusive bargaining agent. We have also urged (supra, pp. 15-21) that, because the duty is intimately entwined with the union's other obligations and powers under the National Labor Relations Act, State or federal court enforcement of the duty creates a risk of inhibiting unions in the exercise of their statutory responsibilities, and thus of conflict with national labor policy, sufficiently serious to require the invocation of the Board's exclusive primary jurisdiction under San Diego Building Trades Council v. Garmon, 359 U.S. 236. Even if we are mistaken, however, in thus concluding that initial competence to adjudicate claimed violations of the duty of fair representation is properly confined to the Labor Board, we nevertheless urge that in whatever forum they are heard, such claims are to be decided by reference to federal law and that under federal law the judgment below cannot stand, hard a snorthly H has, of necessity, "discretion to make such concessions

all, as respondent now contends (see supra, p. 19), Owens' claim was predicated on a breach of the collective bargaining agreement, the proposition that such claim is governed by federal law is too firmly established to require discussion. Textile Workers v. Lincoln Mills, 353 U.S. 448; Local 174, Teamsters V. Lucus Flour Co., 369 U.S. 95; Republic Steel Corp. v. Maddox, 379 U.S. 650. If, as seems more likely, the claim is not contractual in nature, it is equally true that doctrines of local law must give way to the extent that they fail to comport with principles of federal labor law. Local 20, Teamsters v. Morton, 377 U.S. 252; Local 24, Teamsters v. Oliver, 358 U.S. 283. Thus even where it is recognized that State courts have a deeply rooted interest in providing redress for tortious conduct, such remedies may be confined within. limits established by federal law so as to forestall the inhibition of federally protected conduct and avert conflict with national labor policy. Linn v. Plant Guard Workers, 383 U.S. 53.

The governing federal standards have been discussed above (supra, pp. 8-10). They reflect an attempt to strike a vital balance between the union's continuing obligation to protect the interests, both long-term and short, of all the workers in the bargaining unit and its duty fairly to represent the claims of individuals which are not always harmonious with those of the group. Thus, while the union is charged with the responsibility of representing [all employees] tanly and impartially (Wallace Corp. v. National Relations Board, 323 U.S. 248, 265), it nonetheless has, of necessity, "discretion to make such concessions

and accept such advantages as, in the light of all relevant considerations [it] believe[s] will best serve the interests of the parties represented" (Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338). The cardinal consideration, then, is that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and homesty of purpose in the exercise of its discretion." Id. at 338; Humphrey v. Moore, 375 U.S. 335, 349. A State court judgment, though prompted by a salutary concern to protect the rights of the individual, conflicts with federal law insofar as it fails to give effect to that standard. Vested by Congress with a broad discretion in its conduct of industrial self-government, the activities of the statutory bargaining agent should not be constrained by more restrictive State judicial standards.

It is apparent from the opinion of the court below (R. 216-217) that, in considering petitioners' contention that the evidence produced at trial was insufficient to show a violation of the union's duty fairly to represent Owens, the court failed to weigh, or even allude to, the applicable federal standard. Accordingly, we believe that it would be apprepriate for this Court to remand the case for further consideration of the record in light of that standard. However, we also believe that the inadequacy of the Owens' evidence was so marked as to warrant the Court's independent determination that the verdict cannot stand. See Humphrey v. Moore, 375 U.S. at 348-349.

Viewing the evidence in the light most favorable to

the plaintiff (R. 216), the court below noted (1) that "three physicians certified that plaintiff was able to perform his regular work"; (2) that three other physicians certified that "his blood pressure was not dangerously high"; and (3) that Owens had testified that he had done hard physical labor following his discharge (R. 217). This, the court held, was sufficient to warrant a finding that the union had acted arbitrarily and without just cause or excuse in declining to take Owens' grievance to arbitration." On the other hand, there was also evidence that two doctors, whose qualifications were not challenged, had advised that Owens was unfit for work by reason of his congenital heart condition (R. 21, 73, 90, 187-188). Furthermore, there was no evidence, nor was it even contended, that the union acted or failed to act because of any hostility to-Owens. As the court below noted (R. 215):

> • Here the union had nothing to do with Owens being discharged. It is evident that the

In reaching this conclusion the court below did not rafer to the conflicting testimony (supra, p. 4) respecting an alleged demand by petitioner Vaca, president of the local, that Owens pay \$300 as a prerequisite to agreement by the union to take his grievance to arbitration. The court appears to have been correct in its apparent assumption that, under the facts presented, this issue was irrelevant to the question of the union's fairnes. Owens himself believed that Vaca wanted the money to pay for the arbitration, not as a personal reward (R. 80-81). Moreover, as a matter of law the union may well have been justified in requiring, if it did so, that Owens pay for or contribute to the cost of arbitration. Of. Donnelly v. United Fruit Co., 190 A. cal 836, 842 (N.J. Sup. Ct.) Supported Residual Rights in Collective Agreements and Arbitration. 87 N.Y.U.L. Rev. 302, 404-404 (1962).

idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor think is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership.

In sum, the evidence that the court below held sufficient to justify the imposition of compensatory and punitive damages showed at most only that the union had mistakenly appraised the conflicting medical information it received. Assuming that the union was mistaken, such a mistake cannot by itself support an inference that the union acted in bad faith. If such an inference were permissible, virtually no scope would be left for the exercise of the discretion which this Court has recognized "must be allowed a statutory bargaining representative," and its "wide range of reasonableness" would be dramaticall curtailed. Ford Motor Co. v. Huffman, 345 U.S. at 338. Indeed, in order to protect itself from the imposition of substantial liability in such cases, unions might feel impelled to carry to arbitration all grievances that employees request them to press, without regard to the merits thereof. Such a judicially induced abdication of union responsibility would imperil the effectiveness of the grievance procedure. That procedure is now widely relied on to achieve the prompt resolution of countless disputes which, when separately considered and expeditiously disposed of, are for the most part quite minor but which, when aggregated,

can become a potent source of discontent and unrest. Moreover, such curtailment of union discretion involves, pro tanto, a substitution of the court's judgment for that of the union with respect to the whole gamut of difficult questions, the resolution of which has heretofore been left largely to the processes of negotiation.

The preservation of an appropriate area for union discretion would seem to require that, in the absence of affirmative evidence either of hostile motive or "fraud, deceitful action or dishonest conduct" (Humphrey v. Moore, 375 U.S. at 348), liability for violation of a union's duty of fair representation may not be imposed unless there is no reasonable basis for the union's action. "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents "" (id. at 349). Since there was substantial evidence here that Owens was seriously ill, that test requires reversal of the judgment below.

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CONCLUSION

pomisioners and discovers For the foregoing reasons, the judgment of the court below should be reversed. BITTOTALISTA Respectfully submitted.

THURGOOD MARSHALL, Solicitor General. Wolfor Reform Y

Henry respections and

ROBERT S. RIFKIND. Assistant to the Solicitor General.

ARNOLD ORDMAN, General Counsel,

carried to form out. DOMINICK L. MANOLI. Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ, 1980 and a light of light and light affected by on agreement remain Attorney.

National Labor Relations Board.

Sec. S. (a) It shall be an any director reaction for

OCTOBER 1966.

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(1) to restrain or correc (A) simpley sea in. the exercise of the rights quaranteed in section 7: Provided, That this paragraph shall not Mapair the right of a labor organization to pieccan become a potent source of describit and the second described and th

For the foregoing reasons, the judgment of the

APPENDIX Abinone waied truos

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

Jurana D to to RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

- SEC. 8. (a) It shall be an unfair labor practice for an employer—
 - (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •
- (b) It shall be an unfair labor practice for a labor organization or its agents—
 - (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to pre-

(20)

scribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of sec-

hobomon (a);

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

in this office and submit evidence of the alleged dis-

violation of Service Sta) (

scribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representating xidiffer representations of collective

at a second of grievances;;;

NATIONAL LABOR RELATIONS BOARD,

SEVENTEENTH REGION,

Kansas City, Mo., September 16, 1960.

Re: Your File No. 18760

Owens vs. Swift & Company

Allan R. Browne, Esq.
Ennis, Browne and Martin
Kansas City 6, Missouri

Dear Mr. Browne: This agency administers the Labor Management Relations Act of 1947, as amended, by the Labor-Management Disclosure Act. The fact that an employee has been terminated from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment, to encourage or discourage membership in any labor organization. This would be violation of Section 8(a) (3).

In addition, if it can be shown that a labor organization caused, or attempted to cause, an employer to discriminate against an employee in violation of Section 8(a)(3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation of Section 8(b)(2) of the Act

If there is some evidence present that this man was terminated for the reasons above, he should file a charge in this office and submit evidence of the alleged discrimination. There is presently no special National Labor Relations Board bar. As a representative of Benjamin Owens, you are entitled to practice before the Board. I am enclosing a copy of the Rules and Regulations and Statements of Procedure, which will give you a more comprehensive picture of the law and what is considered a yielation under it.

Yours very truly;

S/ Jack I. Orlove
JACK I. ORLOVE, Attorney

Enclosure

INDEX

MOTION	
Intere	st of the AFL-CIO
Conelu	sion
	ary of Argument
Argum	ent
· I. Th	e NLRB Has Exclusive Primary Jurisdiction Over
Δ,	The Subject Matter of this Suit is Arguably Covered by the Act
В.	
C.	The Jurisdiction of the Board over Breach of the Duty of Fair Representation Should be Exclusive
II. Th	e Courts Below Used an Erroneous Standard of bility, And Awarded Improper Relief
. A.	Disposition by the Courts Below
B.	Federal Law Controls As to Both Standard and Remedy
C.	A Union May Refuse to Arbitrate a Grievance If It Acts in Good Faith
D.	Punitive Damages Were Not Allowable
	4

CITATIONS

	Page
Athinan - Cinalnia Patalana G. 200 Y.S. 400	00
Atkinson v. Sinclair Refining Co., 370 U.S. 476 Carey v. Westinghouse Electric Corp., 375 U.S. 261	28 18. 23
Cargo Handlers, Inc., 159 NLRB No. 17 (June 17, 1966)	10, 23
Central of Georgia R. Co. v. Jones, 229 F.2d 648	1.0
Ford Motor Co. v. Huffman, 345 U.S. 330	33
10, 11, 15,	6, 27, 28
Garner v. Teamsters Union, 346 U.S. 485	23
Hughes Tool Company, 147 NLRB 1573	12
Humphrey v. Moore, 375 U.S. 335	2,
4, 5, 10, 19, 20, 21, 24, 25,	
Independent Metal Workers Union, Local No. 1, 147	
International Association of Bridge, etc., Workers, Local	19-14
	18
207 v. Perko, 373 U.S. 701	10
148 NLRB 897	11-12
Linn v. United Plant Guard Workers, 383 U.S. 53	16.
Machinists v. Gonzales, 356 U.S. 617	
Maremont Corporation, 149 NLRB 482	11, 13
Miranda Fuel Company, 140 NLRB 181	2
8, 16, 11, 14, 15, 16, 5	
NLRB v. Local 294, Teamsters Union, 317 F.2d 746	12
NLRB v. Miranda Fuel Co., 326 F.2d 172	12
Ostrofsky v. United Steelworkers, 171 F. Supp. 782	
Owens v. Swift & Co., No. 631298, Circuit Court, Jack-	30
son County, Missouri	1 01
Phelps Dodge Corp. v. NLRB, 313 U.S. 177	21
Radio Officers' Union v. NERB, 347, U.S. 17	34
Parablic Steel Com - Walder 970 Tt C. C. C.	11
Republic Steel Corp. v. Maddox, 379 U.S. 650	10,
25, 2	
Retail Clerks Int. Assn. v. Schermerhorn, 373 U.S. 746	16
San Diego Building Trades Council v. Garmon, 359	
U.S. 236 2, 3, 4, 5, 8, 9, 16, 1	
Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277	85
Smith v. Evening News Assn., 371 U.S. 195 18, 2	20, 33

Cases—Continued	
	2
Sures v. Oil Workers Int Vision 250 V.S. 200	7
Syres v. Oil Workers Int. Union, 350 U.S. 89210, 2	8
Teamsters Union, Local 20 v. Morton, 377 U.S. 252 9, 3 Teamsters Union, Local 174 v. Lucas Flour Co., 369 U.S. 95	
Teamsters Union Local 957 - NIDD DOF TO	1
373 U.S. 690	
United Auto Workers v. Hoosier Cardinal Corp., 383	
United Auto Workers v. Russell, 356 U.S. 634	0
United Auto Workers v. Wisconsin E.R.B., 336 U.S. 245 3	
ware, Inc., 198 F.2d 637	
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62	
United Mine Workers v. Laburnum Const. Corp., 347	
United Rubber Workers, Local 12, 150 NLRB 312 11,	
10 14 04	
363 U.S. 593	
Weber v. Anheuser-Busck, Inc., 348 U.S. 468 9	18
Youngdahl v. Rainfair, Inc., 355 U.S. 131 17	
ATUTES:	
Civil Rights Act of 1964 (78 Stat. 241, 42 U.S.C. § 1981 et. seq.) 34, 35	,,
Labor Management Relations Act, 1947, as amended	
(01 Stat. 130 ff., 29 U.S.C. & 141 ff.)	
Section 203(d) 19	
Section 301 4, 6, 18, 19, 20, 21, 24, 25, 26, 35	
Section 303 3, 5, 16, 22, 23, 35	1000

ISCIELLANIEOUS:	
National Labor Relations Act, as amended (61 Stat	
136, 29 U.S.C. §151 et. seq.) 2, 8, 9, 11, 12, 13, 27, 8	34
Section 7, 2, 3, 8, 9, 11, 2	22
Section 7 2, 3, 8, 9, 11, 2 Section 8 2 3, 4, 8, 9, 11, 15, 16, 17, 2	22
	10
	22
Gardina 1472	16
Railway Labor Act, as amended (45 U.S.C. § 151 et seq.) 6, 8, 12, 14, 2	
Alexander, Impartial Umpireships: General Motors:— UAW; in Arbitration and the Law: proceedings, 12th annual meeting, national academy of arbitra-	1
2 BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, 51: 6-7 (1959)	VI
Cox, The Duty of Fair Representation, 2 Vill. L. Rev.	0
61 LRRM 242 (Report of Remarks of Joseph Murphy, April 25, 1966)	
Note, "Administrative Enforcement of the Right to Fair Representation: The Miranda Case, 112 U. Pa. L. Rev. 711 (1964)	
Ross, Distressed Grievance Procedures and their Re- habilitation, in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS, 16TH ANNUAL MEETING, NA-	
Sovern, Legal Restraints on Racial Discrimination, 174 (1966)	•
Wyle, Labor Arbitration and the Concept of Exclusive Arbitration, 7 Boston College Ind. and Com. L. Rev. , 789	

IN THE

Supreme Court of the United States OCTOBER TERM. 1966

NO. 114

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioners

v.

Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION FOR LEAVE TO FILE A BRIEF AS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief amicus curiae in this case in support of the petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-010

The Motion of the AFL-CIO to file a brief amicus curiae in this case in support of the petition for certiorari was granted by the Court, 384 U.S. 969. Our reasons for requesting leave to file a brief on the merits are substantially the same as those set forth in the Motion.

The AFL-CIO is a federation of one hundred and twentynine national and international unions with a total membership of approximately thirteen and a half million. The instant case involves a relatively small union which is not affiliated with the AFL-CIO. The questions presented, however, are of great importance to all unions and to the institution of collective bargaining.

Briefly stated, they are: What recourse does an employee have if his exclusive collective bargaining representative refuses to process his grievance to arbitration? May the employee bring suit in court, or does his exclusive remedy lie before the National Labor Relations Board? In either case, what showing must the employee make in order to obtain relief? Finally, if he makes out a cause of action, what relief should be afforded?

More than 90 percent of all collective bargaining agreements in the United States provide a grievance and arbitration procedure similar to the one involved in the instant case. 2 bureau of national affairs, collective bargaining negotiations and contracts, 51:67 (1965). Indeed, one of the principal functions of a union during the periods when such an agreement is in effect is to process the grievances that arise. The AFL-CIO, as spokesman for the majority of American unions and their members, therefore has a profound interest in the answers given by the Court to the questions which this case presents. The brief amicus curiae tendered herewith discusses these general issues, on which

the Court has invited the Solicitor General to file a brief amicus for the United States.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief amicus curiae in the instant case.

Respectfully submitted,
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General Counsel, AFL-CIO
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September, 1966

IN THE

Supreme Court of the United States OCTOBER TERM, 1968

NO. 114

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioners

NILES SIPES, Administrator of the Estate of Benjamin .
Owens, Jr., Deceased

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

The interest of the AFL-CIO is set on pages vi-vii of the foregoing motion for leave to file a brief amicus curiae.

SUMMARY OF ARGUMENT

I

1. The first question presented here is whether a claim that an exclusive bargaining representative has breached its duty of fair representation (see Steele v. Louisville and N. R. Co., 323 U.S. 192) in a situation covered by the National Labor Relations Act, is within the exclusive primary jurisdiction of the National Labor Relations Board, or is also cognizable by the courts. In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 246, the Court held that, save in certain exceptional categories of cases the courts must defer to the exclusive competence of the Board in cases "arguably within the compass of \$7 or \$8 of the Act." We submit that Garmon and not its exceptions should be held to apply here since: (1) the subject matter of this suit is arguably within the compass of the Act; (2) this case does not fall within any of the recognized categories of cases over which the courfs have concurrent jurisdiction; and (3) the applicable policy considerations indicate that the courts should not have concurrent jurisdiction over suits such as this so long as the Board asserts that it has jurisdiction.

2. It is indisputable that the subject matter of this suit, is arguably within the regulatory scope of the Act. This Court has several times noted that "there are differing views whether a violation of the duty of fair representation is an unfair labor practice," but the Court has not yet found it necessary to resolve that difference. Humphrey v. Moore, 375 U.S. 335, 344. The Board decisions establish that at the present time it considers any union breach of the duty of fair representation, including a wrongful refusal to process a grievance, to be an unfair labor practice under its so-called Miranda doctrine (Miranda Fuel Co., 140 NLRB 181). Board jurisdiction under Miranda is likewise arguable as far as the sole lower court, which has had to

face the point squarely, is concerned. The Court of Appeals for the Second Circuit rendered three separate and divergent opinions in denying enforcement in *Miranda* (2-1). NLRB v. Miranda Fuel Co., 326 F.2d 172. Quite clearly its decision does not put the question to rest.

In Miranda the AFL-CIO argued that claims that a union has breached its duty of fair representation for reasons unrelated to an employee's right to engage in or refrain from union activities should be remediable in the courts, and not before the NLRB. We continue to think that this position is sound; and we intend to so argue in an appropriate case before this Court. Should the Court accept this position it will then, of course, no longer be "arguable" that a suit like the present is within the primary jurisdiction of the Board. It would be possible for the Court to review the Miranda doctrine in this case, and should it reject it to sustain the jurisdiction of the courts below. That procedure, however, would sanction an initial determination by the courts, rather than the Board, as to whether the disputed activity here is protected under §7 of the Act or prohibited under §8. Hence it would be a repudiation of Garmon, and a return to the discredited and unworkable approach of UAW v. Wisconsin E.R.B., 336 U.S. 245 (see Garmon, 359 U.S. at 245, footnote 4). Therefore we shall not in this brief address ourselves to the merits of the Miranda issue. The question whether, assuming Miranda to be sound doctrine, the courts nevertheless have concurrent jurisdiction, is, of course before the Court in any event.

3. The Act, and the decisions of this Court, establish several categories of cases over which the courts have jurisdiction concurrently with the Board, but, we submit, this case is not within any of those classes of cases.

First, Section 303 of the Act authorizes suits for damages in federal and state courts for any activity which is an unfair labor practice under §8(b)(4). This is the single

exception to primary jurisdiction explicitly created by the Act itself. No other comparable exception has ben recognized by the Court.

Second, there are several categories of cases where courts have concurrent jurisdiction to consider various aspects of certain activities which may also come before the Board, in order to decide whether there has been a violation of some other law or a breach of contract. In none of these cases does the court pass on the question of whether the conduct in question is a violation of the National Labor Relations Act. For example, state courts may forbid, punish, or award damages for "conduct marked by violence and imminent threats to the public order," even though the conduct may constitute and unfair labor practice under §8(b)-(1) of the Act. Garmon, 359 U.S. at 247. Moreover, the courts, state and federal, may entertain a suit under §301 of the Taft-Hartley Act for a breach of a provision in a collective bargaining agreement even though the conduct alleged to constitute the breach would also be an unfair labor practice under the Act.

Third, it may be argued that Humphrey v. Moore, 375 U.S. 335, which we respectfully Submit is unsound insofar as it extends the scope of concurrent jurisdiction, see p. 25, infra, supports concurrent jurisdiction in a case like the present. In that case the Court held that it had jurisdiction, pursuant to \$301, over a suit to enjoin a discharge allegedly in violation of a collective bargaining agreement where it was claimed that the decision of the union-employer Joint Conference Committee approving the discharge " • • • was obtained by dishonest union conduct in breach of its duty of fair representation." However, the present suit is not for breach of contract, and is therefore not within Humphrey v. Moore. The plaintiff did not, as in Humphrey v. Moore, sue both the company and the union, but only the latter. The plaintiff did not, as in Humphrey v. Moore, seek to enforce alleged rights under the contract, or, alternatively, damages for its breach, since he only sought damages from the union for its failure to take Owens' grievance to arbitration and this refusal cannot be considered a breach of a contract because it is evident that the contract did not require the union to carry this grievance or any other to arbitration. And, while it might be contended that the layoff of Owens was in violation of the contract, the union was not privy to that layoff.

4. Several considerations urge that the jurisdiction of the Board over breach of the duty of fair representation be exclusive; while, conversely, the factors which have led the Court to accord concurrent jurisdiction to courts or arbitrators over certain other categories of conduct are inapplicable here.

If the courts have concurrent jurisdiction to entertain suits for breach of the duty of fair representation, they will be performing the precise role which the Board asserts is its under the Act, and will be interpreting the very provisions which the Board administers. Thus all of the determinations of both legal and factual issues which the courts would have to make are within the Board's claimed competence. The overlap is total. In no case (§303 aside) has the Court found concurrent jurisdiction in such a situation. And certainly it is clear that this case does not fit into the major exception to Garmon since it concerns no " overriding state interest such as that involved in the maintenance of domestic peace." (359 U.S. at 247): Finally, this case involves no clear congressional policy running counter to the normal optimum of unified administration, such as those favoring judicial enforceability of collective bargaining agreements, and arbitration of grievances.

The only argument, so far as we are aware, in favor of concurrent court jurisdiction over suits for breach of the duty of fair representation, is that such suits are maintainable under *Humphrey* v. *Moore* if they can be and are

cast in the form of suits for breach of contract under \$301, and that "continuing difficulty" in identifying such suits can be avoided by judicial jurisdiction over all suits for unfair representation. There are at least two answers to this. The determination whether a suit is one for breach of contract under \$301 is surely one of the simpler tasks that confronts the courts. Further, we respectfully suggest that a proper regard for normal industrial relations practices indicates that the line of delineation as to whether a suit involving a claim of unfair representation may be maintained under \$301 should be whether the crux of the claim is breach of contract or breach of the duty of fair representation, and not simply whether the claim can be phrased to raise some issue under a contract.

TI

1. It is clear that the courts below used an erroneous standard of liability and awarded improper relief. There can be no doubt that federal law controls both as to the standard of liability, and as to remedy. The doctrine of fair representation originated with this Court as an interpretation of the Railway Labor Act and the NLRA in the light of the Constitution. By the same token, matters of remedy, such as damages, are controlled by federal law. Any state cause of action which may once have existed for breach of the duty of fair representation has been superseded by federal law.

The federal standard laid down by this Court to guide unions in their discharge of their responsibilities toward the employees they represent accords unions "a wide range of reasonableness." Ford Motor Co. v. Huffman, 345 U.S. 330, 338. The courts below failed to follow this standard and instead imposed a requirement which in effect forces unions to process all grievances to arbitration at peril of liability for damages. Such a rule of law imperils the whole arbitration process: At the present time, both companies and unions act on the theory that each of the parties

to the agreement has an obligation to screen out grievances by attempting in good faith to settle them in the lower steps of the procedure. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit. For example, the figures the AFL-CIO obtained as to the contract between the United Steelworkers and the United States Steel Corporation show that only 5.6% of the 24,351 grievances filed between 1960 and 1965 went to arbitration. These figures show not only that most grievances are in fact settled in the lower steps, but, more importantly, that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties failed to settle the vast majority of grievances short of arbitration.

2. We submit that federal law does not sanction the award of punitive damages for breach at the duty of fair representation. Punitive damages have not, except in this case, as far as we have found, been awarded in any of the suits which have been entertained by the courts for breach of the duty of fair representation, or for a breach of contract under \$301, or for a violation of \$303. In the cases where it finds a breach of the duty of fair representation, the NLRB enters a cease and desist order, and, where appropriated also orders reinstatement and back pay. If the union had taken Owens' case to arbitration and, improbably, won, he would have been reinstated with back pay minus interim earnings. There is thus neither policy, precedent, or analogy for sustaining the award of punitive damages in this suit.

ARGUMENT

THE NLRB HAS EXCLUSIVE PRIMARY
JURISDICTION OVER THIS CONTROVERSY

In Steele v. Louisville & N.R. Co., 323 U.S. 192, this Court held that a union which is by federal statute the ex-

clusive collective bargaining representative of all employees owes them a duty to represent them fairly. That case arose under the Railway Labor Act which does not provide for administrative enforcement of its substantive provisions, and the Court accordingly held that (p. 207):

"In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative is of judicial cognizance. For the present command there is no mode of enforcement other than resort to the courts "

Since 1962 the National Labor Relations Board has repeatedly held that in cases covered by the National Labor Relations Act a union's breach of its duty of fair representation is an unfair labor practice remediable by the Board. (See, infra, pp. 11-12) The first question here presented is whether a claim of unfair representation, in a situation covered by the National Labor Relations Act, is within the exclusive primary jurisdiction of the Board, or is also cognizable by the courts. We contend that the jurisdiction of the Board is exclusive.

In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 246, the Court held that, save in certain exceptional categories of cases such as those involving breach of the peace, the courts must defer to the exclusive competence of the Board in cases "arguably within the compass of §7 or §8 of the Act." See also Local 100, United Association of Journeymen v. Borden, 373 U.S. 690, 693.

We submit that the subject matter of this suit (1) is arguably within the compass of the Act; (2) that it does not fall within any of the recognized categories of cases over which the courts have concurrent jurisdiction; and (3) that the courts should not, as a matter of policy, have concurrent jurisdiction over suits like this so long as the Na-

tional Labor Relations Board asserts that it has jurisdiction.

The first two of these propositions are quite clear and easily demonstrated. The third proposition is more doubtful, but we submit that on balance the applicable considerations weigh in favor of exclusive primary jurisdiction in the Board.

A. The Subject Matter of this Suit is Arguably Covered by the Act

It has been settled, at least since San Diego Building Trades Council v. Garmon, 359 U.S. 236, that the NLRB has, in general, exclusive primary jurisdiction to determine the reach of the National Labor Relations Act, and that, except for certain categories of cases (considered infra, pp. 15-22) over which the courts have concurrent jurisdiction, it is for the Board, and not the courts, to decide in the first instance whether an activity arguably subject to the Act is within the protections of §7 or §8, is "left . . . free for the operation of economic forces," or is altogether outside the intendment of the Act. At an earlier stage in the development of preemption doctrine this Court in at least one instance sustained the assertion of initial jurisdiction by the courts because this Court ultimately concluded that the activivity was outside the Act, even though the issue was an arguable one. United Auto Workers v. Wisconsin ERB, 336 U.S. 245. In Garmon, however, the Court declared, referring to United Auto Workers v. Wisconsin ERB, that (359 at 245, footnete 4):

"The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application."

Weber v. Anhouser-Busch, Inc., 348 U.S. 468, 480-481. See also Local 20, Teamsters Union v. Morton, 377 U.S. 252, 260.

It is indisputable that the subject matter of this suit, i.e., the union conduct challenged herein, is arguably within the regulatory scope of the Act. Indeed the question whether a union's breach of its duty of fair representation is an unfair labor practice under the Act, even if unrelated to encouraging union membership or activities, is one of the most controversial legal issues now before the Board and the courts.2 This Court itself has several times noted that "there are differing views whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act," but the Court has not yet found it necessary to resolve that difference. Humphrey v. Moore, 375 U.S. 335, 344. See also Local 100, United Association of Journeymen v. Borden, 373 U.S. 690, 696, footnote 7; Republic Steel Corp. v. Maddox, 379 U.S. 650, 652.

It has been settled law since Steele v. Louisville & N.R. Co., 323 U.S. 192, that a union which is by statute the exclusive bargaining representative of all of the employees in a unit owes all of them a duty to represent them fairly. While the Steele case arose under the Railway Labor Act, the provisions of \$9(a) of the National Labor Relations Act as to exclusive representation are comparable, and the same duty of fair representation arises under that Act. Ford Motor Co. v. Huffman, 345 U.S. 330, 337; Syres v. Oil Workers Int. Union, 350 U.S. 892; Humphrey v. Moore, 375 U.S. 335, 342. These decisions likewise make it clear that the bargaining representative's right to resolve grievances or contractual issues, so long as it acts in good faith, is protected by the Act.

² See, e.g., Cox, The Duty of Fair Representation, ² Vill. L. Rev. 151, 173-174 (1957); Note, "Administrative Enforcement of the Right to Fair Representation: The Miranda Case," 112 U. Pa. L. Rev. 711 (March, 1964); Sovern, Legal Restraints on Racial Discrimination in Employment, 143-175 (1960).

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility." (Huffman, 345 U.S. at 339).

Prior to 1962 the Labor Board never took the position that a union's breach of its duty to represent fairly all employees in the unit was an unfair labor practice under \$\fo\$ 7 and 8 of the Act, unless the discrimination were related to "union membership, loyalty, the acknowledgement of union authority, or the performance of union obligations." Miranda Fuel Company, 140 NLRB 181, 197 (dissenting opinion) (1962). However, in the Miranda case the Board held by a vote of three to two that union induced discrimination against an employee, which was "arbitrary and without legitimate purpose," violated \$8(b)(1) and (2) of the Act, even though the discrimination was not related to union membership or activities or fealty; and that the employer had likewise violated \$8(a)(1) and (3).

The Board has since applied the Miranda doctrine in a number of cases, including one decided as recently as June 17, 1966. See, e.g., Cargo Handlers, Inc., 159 NLRB No. 17 (June 17, 1966); Local 12, United Rubber Workers, 150 NLRB 312 (1964); Maremont Corporation, 149 NLRB 482 (1964); Local 1367, International Longshoremen's Associa-

On the other hand, discrimination with regard to employment "to encourage or discourage membership" in a union is specifically barred by the Act, \$\$(a)(3) and \$8(2), and these bans extend as well to discrimination encouraging union fealty or loyalty, even though no question of membership is involved. Radio Officers' Union v. NLRB, 347 U.S. 17; cf. Local 357, International Brotherhood of Teamsters v. NLRB 365 U.S. 667.

Since the Miranda decision two of the Board members who were in the majority have left the Board, and been replaced by new appointees. The situation at present appears to be that two members (Brown and Jenkins), adhere to the Miranda doctrine; that the two members who dissented in Miranda (Chairman McCulloch and Member Fanning), continue to reject the doctrine; and that the newest member, Zagoria, has not as yet voted on the issue.

tion, 148 NLRB 897 (1964); Hughes Tool Company, 147 NLRB 1573 (1964). While it is not clear whether a majority of the present members of the Board accept or reject Miranda, inasmuch as that doctrine has not been repudiated and is still being applied by the Board, it seems indisputable that a claim for breach of a union's duty of fair representation is, as far as the Board is concerned, arguably within the Board's jurisdiction.

Board jurisdiction under Miranda is likewise arguable as far as the courts are concerned. The Court of Appeals for the Second Circuit denied enforcement in Miranda, two to one, with one judge rejecting the Board's Miranda doctrine in toto, one judge rejecting it in part, and one judge voting to uphold the Board. NLRB v. Miranda Fuel Co., 326 F.2d 172. See also NLRB v. Local 294, Teamsters Union, 317 F.2d 746 (2d Cir.). However, as stated supra, p. 10, this Court has several times taken note of the Board's Miranda doctrine, and reserved decision as to its validity.

The AFL-CIO argued in a brief amicus in the Court of Appeals in Miranda that the legal doctrine announced by the Board majority in that case is erroneous; and that a union's breach of its duty of fair representation is not an unfair labor practice unless it is related to an employee's right to engage in or refrain from union activities. We further took the position that a breach of the duty of fair representation is remediable in the courts, and not before the NLRB.

The brief for the AFL-CIO stated, pp. 25-26:

[&]quot;We naturally are not advocating that an employee whose section 9 right to fair representation is violated, on any ground, should be without a remedy. But the proper forum in which to seek redress for unfair representation or discrimination, when it is not based upon an employee's union activities, is a court and not the NLRB. A number of leading decisions establish that a union's duty to represent fairly is judicially enforceable, whether that duty arises under the Railway Labor Act or the National Labor Relations Act."

We continue to think that both of these positions are sound; and we hope to so argue in an appropriate case before this Court. If the Court ultimately rejects the Board's Miranda doctrine, or if a majority of the members of the Board repudiate it, it will then of course no longer be "arguable" that a suit like the present is within the primary jurisdiction of the NLRB, and the courts will accordingly then be free to assert jurisdiction. Retail Clerks Int. Assn. v. Schermerhorn, 373 U.S. 746, 755-756. Meanwhile, however, it is patent that claims like that on which this suit is based are arguably within the primary jurisdiction of the Board.

The court below, without acknowledging the existence of the Board's Miranda doctrine, apparently took the position that a union's breach of its duty of fair representation cannot constitute an unfair labor practice unless the union induces the employer to discriminate against an employee with respect to his employment; and the court stressed that "the union had nothing to do with Owens being discharged." (R. 215.) The court, in other words, thought that not every union breach of the duty of fair representation is arguably an unfair labor practice; and that a mere failure to take to arbitration a layoff which originated with the employer cannot be an unfair labor practice.

However that is not the position the Board has taken. The Board apparently considers that any union breach of the duty of fair representation is an unfair labor practice: its Miranda doctrine is coextensive with the Court's Steele doctrine. Put another way, the Board is undertaking to enforce, in situations covered by the National Labor Relations Act, the duty of fair representation articulated by the Court in Steele. Thus the Board has declared (Independ-

Local 12, United Rubber Workers, 150 NLRB 312, which presents the. Miranda issue, is pending decision in the Fifth Circuit.

ent Metal Workers Union, Local No. 1, 147 NLRB 1573, 1575):

"When the Supreme Court enunciated the duty of fair representation in Steele and Tunstall, supra, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act * * are enforcible by the Federal courts, not by an administrative agency. When the Labor Board, in recognition of the Steele and Tunstall doctrines, held that under the Wagner Act statutory bargaining representatives owe to their constituents a duty to represent fairly, the Board's holding necessarily was confined to representation proceedings because the Board had no power to issue an order against a labor organization. After enactment of the Taft-Hartley Act, however, an administrative remedy became available in our view

Furthermore, the Board has specifically held that a union's failure to process grievances through arbitration may be an unfair labor practice. Local 12, Rubber Workers Union, 150 NLRB 312, 57 LRMR 1535, now pending in the Fifth Circuit on petition for enforcement. The Board declared (57 LRRM at 1536):

"Moreover, the duty of fair representation may be breached not only by action, but by inaction as well, such as the refusal to process a grievance."

And the Board in that case ordered the union to process certain grievances through arbitration.

It would, of course, be possible for the Court to review the Miranda doctrine in this case, and if it rejects it for the Court to sustain the jurisdiction of the courts below. That, however, would involve the repudiation of Garmon, and a return to the discredited and unworkable approach of UAW v. Wisconsin E.R.B. Hence we shall not in this brief address ourselves to the merits of the Miranda issue.

The question whether, assuming Miranda to be sound doctrine, the courts nevertheless have concurrent jurisdiction, is of course before the Court, although the Court may prefer to dispose of the case upon the merits without deciding the jurisdictional issue, as in Ford Motor Co. v. Huffman, 345 U.S. 330.

B. This Suit is not a Case Over Which the Courts Have Been Held to Have Concurrent Jurisdiction

The Act and the decisions of this Court establish several categories of cases over which the courts have jurisdiction concurrently with the Board, but, we submit, this case is not within any of those classes of cases; or within the rationales which led to the recognition of those categories.

1. Section 303 of the Act explicitly authorizes suits for damages in federal and state courts for any activity which is an unfair labor practice under §8(b)(4). This is the only clear instance in which the Board and the courts have concurrent jurisdiction to apply to the Act, that is where the courts have authority to adjudicate directly and not collaterally whether conduct constitutes an unfair labor practice. It is significant that this is the single exception explicitly created by the Act itself; and that no other such exception has been recognized by the Court; for there is a high potential of conflict when the courts and the Board both have authority to adjudicate the legality of the same conduct under the same statutory provision. See, e.g., United Brick & Clay Workers of America v. Deena Artware, Inc., 198 F.2d 637 (6th Cir.), cert. denied, 344 U.S. 897, rehearing denied, 344 U.S. 919.

Put another way, \$303 is the only provision in the Act which creates a private right of action for an unfair labor practice. And what is here being sought is, assuming the *Miranda* doctrine to be sound, the recognition of another private right of action for an unfair labor practice, with the likelihood of direct conflict between Board and courts that that would involve.

- 2. Section 14(b) grants or preserves the power of the States to ban union security agreements otherwise permissible under the Act; and this Court has held that §14(b) permits the state courts to enforce such state laws, beginning with, but not preceding, the actual execution of a contract violative of state law. Retail Clerks Int. Assn., Local 1625 v. Schermerborn, 375 U.S. 96, 105.
 - 3. The state courts may forbid, punish, or award damages for "conduct marked by violence and imminent threats to the public order," even though the conduct may constitute an unfair labor practice under §8(b)(1) of the Act. San Diego Building Trades Council, etc. v. Garmon, 359 U.S. 236, 247.

"State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (359 U.S. at 247.)

Last term the Court, in a 5-4 decision, extended its "violence" doctrine to embrace civil actions for libel occurring during a union organizing campaign. Line v. United Plant Guard Workers, 383 U.S. 53.

If a violation of a state union-security law authorized by \$14(b) is a federal unfair labor practice under the Act—a point never decided—then the Board and the state courts have concurrent jurisdiction over the conduct constituting the violation. They would not, however, be applying the same statutory provisions, though the authority of both would stem from \$14(b); for the Board would be enforcing \$\$(8(b)(2)) and \$\$(a)(3) of the Act, while disregarding the proviso to the latter because of \$\$14(b)\$, whereas the state courts would be enforcing the state statutes permitted to operate by \$14(b). See Retail Clerks Int. Assn. v. Schermerborn, 373 U.S. 746, 756-757.

In these cases, the courts apply state law and the Board the federal Act.

The jurisdictional reach of the courts and the Board is likewise different. Court jurisdiction is limited to dealing with violence or threats thereof; while the jurisdiction of the Board reaches violence only if it coerces employees in their exercise of rights under the Act, but also embraces nonviolent unfair labor practices. Thus the area of overlap between courts and Board is likely to be small.

Some overlap in jurisdiction between Board and courts, and "fragmentation" is the handling of the dispute, is, however, unavoidable. As the Court declared in United Auto Workers v. Wisconsin E.R.B., 351 U.S. 266, 272:

"It seems obvious that §8(b)(1) was not to be the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike was in progress. No one suggests that such violence is beyond state criminal power."

State criminal jurisdiction being clear, the area of controversy has been, rather, whether state court jurisdiction extends to damage and equity suits, and whether the States may provide an administrative remedy.¹⁰

4. In International Assn. of Machinists v. Gonzales, 356 U.S. 617, the Court upheld the jurisdiction of the state courts over a suit whose "crux" (p. 618) was alleged wrongful expulsion from union membership. The expulsion had resulted in employment discrimination, and while the principal relief sought and granted was reinstatement to membership, the state courts also awarded damages for lost

Youndahl v. Rainfair, Inc., 355 U.S. 131.

¹⁰ See, e.g., United Auto Workers v. Wisconsin E.R.B., 351 U.S. 266, 274-275, 275-276 (dissenting opinion); United Auto Workers v. Russell, 356 U.S. 634, 647, 659 (dissenting opinion); United Mine Workers v. Laburnum Const. Corp., 347 U.S. 656, 669-671 (dissenting opinion).

wages and for physical and mental suffering. The courts' jurisdiction to order reinstatement was conceded, but the jurisdiction to award damages was challenged on the ground that employment discrimination was within the jurisdiction of the Board. The jurisdiction of the courts was upheld, however, on the grounds that the crux of the action—expulsion from membership—fell outside the area of Board concern.

Subsequent cases suggest that Gonzales may have been undercut by Garmon as regards jurisdiction to award damages; and they at any rate make it clear that if the "crux" or essence of the action is employment discrimination arguably subject to the Board's jurisdiction, the courts may not entertain the suit. Local 100, United Association of Journeymen v. Borden, 373 U.S. 690; Local 207, Int. Assn. of Bridge, etc., Warkers v. Perko, 373 U.S. 70k

In the present suit not only the crux but the totality of the suit is arguably within the Board's jurisdiction.

5. Smith v. Evening News Assn., 371 U.S. 195, held that the courts, state and federal, may entertain a suit under \$301 of the Taft-Hartley Act for breach of a provision in a collective bargaining agreement, that there shall be no discrimination against any employee for union membership or activity, even though the conduct alleged to constitute the breach would also be an unfair labor practice under the Act. 11

The same doctrine was applied in Carey v. Westinghouse Electric Corp., 375 U.S. 261, to a suit to compel arbitration of issues that could have been adjudicated by the Board in unfair labor practice proceedings under the Act. The Court declared (p. 272);

¹¹ Justice Black dissented. Under the view expressed in his opinion it is clear that the courts could not entertain suits like the present, since the questioned activity is arguably covered by the Act.

"By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' and which may be dispositive of the entire dispute, are encouraged."

Conduct which is arguably an unfair labor practice is often also violative of a collective bargaining agreement, though breach of contract is not itself an unfair labor practice. A holding that breaches of contract are not remediable by suit under \$301, or via grievance and arbitration, if the conduct constituting the breach is also arguably an unfair labor practice, would thus have run counter to the provision in \$301 that collective bargaining agreements shall be judicially enforceable, and to the policy of the Act (\$203(d)) favoring arbitration of disputes under collective agreements.

6. We come then to *Humphrey* v. *Moore*, 375 U.S. 335, and to the key question whether that decision supports concurrent jurisdiction in a case like the present; for it is quite clear that none of the other decisions of the Court do.

In Humphrey v. Moore individual employees brought suit to enjoin their discharge. They alleged that their discharge would violate the seniority provisions of the collective bargaining agreement; and that a determination adverse to their claims which had been made by the union-employer Joint Conference Committee 12 violated the agreement and

was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for his discharge under the contract." (375 U.S. at 342.)

¹² Referral to the Joint Conference was the third step under the contract grievance machinery. Decisions of the Joint Conference Committee were final and binding, but if the Committee failed to reach agreement the matter could be referred to arbitration.

The Court held, first, that since the suit was for breach of contract it was maintainable under §301. It declared (375 U.S. at 344):

"Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is or, arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith v. Evening News Assn., supra, subject of course, to the applicable federal law." (Footnotes omitted).

On the merits, the Court held that the interpretation given the collective bargaining agreement by the Joint Committee was a permissible one, and that there was no fraud or breach of duty by the union.

Justices Goldberg and Brennan, and (perhaps) Douglas, concurring, took the position that the suit was not maintainable as one for breach of contract under \$301, for the reason that the union and the employees were free to resolve the dispute by amending the contract or entering into a grievance settlement; and that no breach of good faith was shown.

Justice Harlan, concurring in part and dissenting in part, agreed with the Court majority that the suit was maintainable under \$301 as one for breach of contract; but urged that the Court should decide the further question whether the suit would lie as one for breach of the duty of fair representation or whether, in that aspect, it was preempted by the primary jurisdiction of the NLRB.

We respectfully submit, as developed infra p. 25, that the Humphrey v. Moore extension of concurrent jurisdiction is unsound, so long as the Board's Miranda doctrine stands, as respects suits whose crux is breach of the union's duty of fair representation, even though the suit be framed as one for breach of contract under §301. However, the present suit is not for breach of contract, and is not within Humphrey v. Moore.

The plaintiff did not, as in Humphrey v. Moore, sue both the company and the union, but only the latter. The plaintiff did not, as in Humphrey v. Moore, seek to enforce alleged rights under the contract, or, alternatively, damages for its breach, but sought damages from the union for its failure to take his grievance to arbitration. And the plaintiff brought a separate action, which is still pending against the company for breach of the collective bargaining agreement. (Owens v. Swift & Co., No. 631293, Circuit Court, Jackson County, Missouri.)

The brief in opposition to the petition for certiorari asserts that the basis of the suit is (pp. 1-2, 5):

"that the Union, as the member's representative, breached a collective bargaining agreement with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth, arbitration, step of a grievance procedure set forth in the bargaining agreement."

However, it is evident that the contract did not require the union to carry this grievance or any other to arbitration, so that the union's failure to do so cannot possibly be regarded as a breach of contract. It might be contended that the layoff of Owens was in violation of the contract, but the union was not privy to that layoff. As the court below said (R. 215):

"Here the Union had nothing to do with Owens being discharged. It is evident that the idea originated with the employer. * * Nor is there any evidence to

indicate that the Union representatives took any affirmative action to prevent the re-employment of Owens."

If there was any breach of contract it was by the employer, and, as stated, the plaintiff has not sued the employer in this action.

Thus the present suit is not maintainable under any of the exceptions yet recognized to the rule that the NLRB has exclusive primary jurisdiction of matters arguably subject to the Act. We urge that no new exception be created encompassing such suits as the present.

C. The Jurisdiction of the Board over Breach of the Duty of Fair Representation Should be Exclusive

Several considerations urge that the jurisdiction of the Board over breach of the duty of fair representation be exclusive; while, conversely, the factors which have led the Court to accord concurrent jurisdiction to courts or arbitrators over certain categories of conduct are inapplicable here.

1. The Board's primary jurisdiction under §10 to adjudicate unfair labor practices is exclusive, save for the explicit statutory exception in §303. While courts or arbitrators have concurrent jurisdiction to consider various aspects of certain activities which may also come before the Board, they do not decide whether these activities constitute unfair labor practices under §§7 and 8 of the Act, but rather whether they are in breach of a collective bargaining agreement, or of some provision of state or federal criminal or civil law. Thus the likelihood of conflicting interpretations of the Act is considerably diminished.¹³

¹³ Questions involving the interpretation of the Act do come before the courts collaterally, as in breach of contract suits or actions to enjoin picket line conduct, since the courts may not ban or amerce for conduct protected by the Act. See, e.g., Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95; United Mine Workers v. Arkaneas Oak Flooring Co., 351 U.S. 62.

If, however, the courts have concurrent jurisdiction to entertain suits for breach of the duty of fair representation, they will be performing the precise role which the Board asserts is its under the Act, and will be interpreting the very provisions which the Board administers. As the Court declared in Garner v. Teamsters Union, 346 U.S. 485 490-491:

- "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."
- 2. Not only is the "crux" of the present controversy arguably within, the jurisdiction of the Board, but the Board's asserted jurisdiction embraces this controversy in its entirety, as respects both facts and law. All of the determinations of both legal and factual issues which the courts have made are within the Board's claimed competence. The overlap is total. In no case (\$303 aside) has the Court found concurrent jurisdiction in such a situation.
- 3. The desirability of avoiding "fragmentation" of a dispute, stressed in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272, can be met by exclusive Board jurisdiction, since the entire controversy is within its asserted reach.
- 4. The diversity of remedies would encourage undesirable forum shopping, if court jurisdiction were sustained. The court below sustained an award of \$7000 for actual damages and \$3000 for punitive damages. The Board, on the other hand would at most simply have ordered the union to process the grievance to arbitration. Local 12, Rubber Workers Union, 150 NLRB 312. Diverse periods of limitations would likewise result. Cf. UAW v. Hoosier Cardinal Corp., 383 U.S. 696.

¹⁴ International Association of Machinists v. Gonzales, 356 U.S. 617, 618; United Association v. Borden, 373 U.S. 690, 697.

This diversity of remedies argues against, not in favor of, concurrent jurisdiction. As the Court said in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247:

"[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."

- 5. This case concerns no " overriding state interest such as that involved in the maintenance of domestic peace." Garmon, 259 U.S. at 247.
- 6. This case involves no clear congressional policy running counter to the normal optimum of unified administration, such as those favoring judicial enforceability of collective bargaining agreements, and arbitration of grievances.
- 7. The only argument, so far as we are aware, in favor of concurrent court jurisdiction over suits for breach of the duty of fair representation, is that such suits are maintainable under *Humphrey* v. *Moore* if they can be and are cast in the form of suits for breach of contract under §301, and that "continuing difficulty" in identifying such suits can be avoided by judicial jurisdiction over all suits for unfair representation.¹⁵

There are at least two answers to this.

The determination whether a suit is one for breach of contract under \$301 is surely one of the simpler tasks that confronts the courts; and it is in any event a determination which has to be made in all suits brought under \$301 which do not involve claims of unfair representation. Thus far Humphrey v. Moore is the only \$301 suit which included a

¹⁸ Sovern, Legal Restraints on Racial Discrimination, 174 (1986).

claim of unfair representation, though there has been a large volume of §301 litigation.

Further, we respectfully suggest that the proper line of delineation as to whether suit involving a claim of unfair representation may be maintained under \$301 should be whether the crux of the claim is breach of contract or breach of the duty of fair representation, and not whether the claim can be phrased to raise some issue under a contract. Thus an employee can sue for breach of the wage provisions of a collective bargaining agreement, at least in the absence of any provision in the agreement making arbitration or suit by the union the exclusive remedy," and there can be little doubt that the crux of such a claim is the alleged breach of contract. In a suit like the present, on the other hand, it is evident that the crux of the claim is the union's alleged breach of its duty of fair representation, by its failure to take the plaintiff's grievance to arbitration. Such a suit should not be maintainable under \$301, even though the grievance of course arose under a collective bargaining agreement. If an employee sues to enforce alleged rights under a collective agreement, and the union and the employer have undertaken to abrogate the claimed rights, either by negotiating a new agreement or via settlement of a grievance, a question arises whether the crux of the claim is for breach of contract or for unfair representation. Cf. Humphrey v. Moore, 375 U.S. 335. To make the answer turn on whether the abrogation was undertaken by way of a new contract or by way of a grievance settlement exalts form over substance and disregards normal industrial relations practice. It appears to us that in either case the essence of the employee's claim is unfair representation by the union, or by union and employer acting in collusion.

¹⁶ Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-658.

In any event, however, whether the crux test be applied or the test whether the claim is posed as one for breach of contract, it is clear that the present suit does not fall within \$301.

In short, we submit that no major policy consideration argues for concurrent judicial jurisdiction; while several weigh against it.

п

THE COURTS BELOW USED AN ERRONEOUS STANDARD OF LIABILITY, AND AWARDED IMPROPER RELIEF

A. Disposition by the Courts Below

1. The standard of liability used. The trial court instructed the jury that it might bring in a verdict for the plaintiff if it found that the union (R. 161):

excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respect •••"

If this gobbledegook means anything, it is that it was up to the union to justify to the jury the union's refusal to take the grievance to arbitration.

The Missouri Supreme Court explicitly approved this instruction, and concluded that there was sufficient evidence from which the jury could have found "the foregoing issue" in favor of the plaintiff. (R. 216-7.) The court then recited evidence which bore, not on the union's good faith or lack of it in refusing to take the grievance to arbitration, but

on whether Owens was in fact physically able to work (R. 217.) Thus the state Supreme Court in effect held that the jury could properly find for the plaintiff if there was evidence that Owens was actually able to work.

2. Relief awarded. The verdict awarded the plaintiff \$7000 actual and \$3300 punitive damages. Since the prayer for punitive damages was in the amount of \$3,000, the state Supreme Court required a remittitur in the amount of \$300. (R. 217).

B. Federal Law Controls As to Both Standard and Remedy

It is quite clear that federal law controls both as to the standard of liability, and as to remedy.

The doctrine of fair representation originated with this Court in Steele as an interpretation of the Railway Labor. Act in the light of the Constitution. (See 323 U.S. at 202-203). As respects situations covered by the National Labor Relations Act, the doctrine is similarly derived from the previsions of that Act. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339. Federal law controls on the related question of the scope of judicial review of arbitration awards under collective bargaining agreements. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593. Federal substantive law would, of course, likewise control if the suit rested on alleged breach of the collective bargaining agreement. Humphrey v. Moore, 375 U.S. 335.

It is no less clear that matters of remedy, such as damages, are controlled by federal law. See Steele, 323 U.S. at 207. In Republic Steel Corp. v. Maddox, 379 U.S. 650, the Court held that (p. 652):

"• • federal labor policy requires that individual employees wishing to assert contract grievances must

attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

And the Court added:

"If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."

That these "differences" are likewise resolvable by federal law is apparent. Any state cause of action which may once have existed for breach of the duty of fair representation has been superseded by federal law, and that law controls both as to substantive law and damages. Local 20, Teamsters Union v. Morton, 377 U.S. 252; Atkinson v. Sinclair Refining Co., 370 U.S. 476.

C. A Union May Refuse to Arbitrate a Grievance If It Acts in Good Faith

The opinion of the court below leaves doubt whether it held that a union must take every case to arbitration if the grievant insists, or that the union acts at its peril in refusing to go to arbitration if a jury later finds the grievance meritorious. But there is no doubt that the court departed from the standards repeatedly laid down by this Court to guide unions in their discharge of their responsibilities toward the employees they represent.

In Ford Motor Co. v. Huffman, 345 U.S. 330, 338, the Court declared:

"A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

The Court quoted this language with approval in Humphrey v. Moore, 375 U.S. 335, 349, and it added:

"Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Indeed, in *Humphrey* v. *Moore* the Court went well beyond what is required for the disposition of the present case, in holding that the union was not, so long as it atted in good faith, precluded from supporting the claims of some employees and opposing the antagonistic claims of other employees whom it represented.

Here, in contrast, the union represent no interest adverse to Owens. The State Supreme Court declared (R. 215).

> "Here the union had nothing to do with Owens being discharged. It is evident that the idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the 'fifth step' and thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim."

It is thus virtually uncontradicted that the union refused to take the plaintiff's grievance to arbitration simply because in the judgment of the union officials he did not have a good case.

G

Any dectrine that unions must process all grievances to arbitration at peril of liability for damages would imperil the whole arbitration process. As pointed out in Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 791 (Md. 1959), aff a 273 F.2d 614 (4th Cir., 1960), cert. denied, 363 U.S. 849, "Public officials and arbitrators, as well as employers, constantly remind union officials that they have a duty to discountenance disruptive and frivolous claims." And the same court declared (171 F. Supp. at 793):

"The employer expects and demands that the Union screen' grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers.

This same conclusion has been reached by an attorney of wide experience in arbitration:

"Many employers who accept arbitration as the avenue for labor dispute settlement during the contract term do so secure in the knowledge that the union has demonstrated responsibility and will not plague the employer with meritless claims. In fact, employers rely upon the union to sift out and reject, through investigation and the grievance machinery steps preliminary to arbitration, those employee complaints which lack substance." (Wyle, Labor Arbitration and the Concept of Exclusive Arbitration, 7 Boston College Industrial and Commercial Law Review 789).

Claims by employees that the employer has taken some action which violates the applicable collective bargaining agreement arise daily. Their resolution through grievance procedures, similar to those provided in the agreement involved in the instant case, with the right ultimately to go to arbitration, is normally the union's principal collective bargaining function during the contract term.

At the present time, both companies and unions act on the theory that each of the parties to the agreement has an obligation to screen out grievances by attempting in good faith to settle them in the lower steps of the procedure. It is understood, in other words, that there must be a willingness to reach a meeting of the minds, rather than to remain adamant on each grievance. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit." Moreover, as a reflection of this understanding, whenever a substantial portion of the grievances filed in a plant are being taken to arbitration, that is regarded as a symptom of bad labor relations, a "distressed" situation requiring remedial action. See the discussions by the present Director of the Bureau of Labor Statistics, Arthur M. Ross, in Ross. Distressed Grievance Procedures and their Rehabilitation, in LABOR ARBITRATION AND INDUSTRIAL CHANGE PROCEEDINGS; 16th ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 104, 107 (1963). Dr. Ross notes that the most frequent cause of such breakdowns is the "refusal of international and local union officers to screen out the griev-Ances

To illustrate how the grievance and arbitration procedure normally works, the AFL-CIO has obtained from its two largest affiliates, the United Steelworkers of American and the United Automobile Workers, figures showing the number and percentage of grievances settled in the lower steps of the grievance and arbitration procedure between these unions and two employers, United States Steel Corporation and General Motors Company.

¹⁷ See Alexander, Importial Umpireships: General Motors, UAW; in Arbitration and the Law: PROCEEDINGS, 12th Annual Meeting, NATIONAL ACADEMY OF ARBITRATORS, 108, 128-129 (1959).

The figures for General Motors are as follows:

Tear 1959		
Written Grievances	89,408	
Settled 18—Step One	53,984	- 61.0%
Settled Step Two	25,631	28.9%
Settled—Step Three	8,863	\$ 10.0%
Settled-Unipire	35	0.04%
Year 1962		
Written Grievances	114,611	.0
Settled Step One	72,999	66,0%
Settled—Step Two	26,694	24.1%
Settled-Step Three	10,841	9.8%
Settled—Umpire	. 33	0.03%

The figures for United States Steel are:

Years 1960-1965	
Grievances Processed Beyond First	Step ** 24,351.
Settled-Step Two	38%
Settled—Step Three	21%
Settled+ Step Four	31%
Docketed for Arbitration	10%
Settled—Arbitration	5.6%

These figures show not only that most grievances are in fact settled in the lower steps, but, more importantly, that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties failed to settle the vast majority of grievances short of arbitration. This is especially clear once it is realized that in most cases the agreement provides that the employees must, without protest, accept, and work under, the employ-

[&]quot;Settled" as used here refers to grievances which are granted, com-

¹⁰ No record is kept of the number of grievances filed but settled in the first step.

er's decision until he agrees to reverse it or is ordered to do so by an arbitrator. At the present time the delays which occur when a case goes through all the grievance steps, and which must be anticipated in even the most efficiently administered system, are not an insupportable hardship because multi-step grievances are exception rather than the rule. This, of course, would no longer be true if most grievances were processed to arbitration. Moreover, since the higher steps are more formal than the lower, it can be anticipated that grievances taken to arbitration would takedonger to decide than the same grievance would today."

D. Punitive Damages Were Not Allowable

We submit that federal law does not sanction the award of punitive damages for breach of the duty of fair representation.

- 1. Suits for Breach of Duty. Punitive damages have not, as far as we have found, been awarded in any of the suits which have been entertained by the courts for breach of the duty of fair representation, except the present suit. Usually the remedy granted has been simply to enjoin the breach. See, e.g., Steele v. Louisville & N.R.R. Co., 323 U.S. 192. In one case the Court also awarded back wages minus actual earnings. Central of Georgia R. Co. v. Jones, 229 F.2d 648 (5th Cir. 1956), cert. denied, 352 U.S. 848.
- 2. Labor Board Remedies. In the cases where it finds a breach of the duty of fair representation, the Board, just as in other unfair labor practice cases, enters a cease and desist order, and where appropriate, also orders reinstate-

There is already some indication that the confused state of the law as to the nature and scope of the union's legal obligation to employees in handling their grievances has resulted in an increasing reluctance on the part of some unions to settle grievances. See a.g., report of a speech by Joseph Murphy, Vice President of the American Arbitration Relations Reporter, 61 LRRM 242.

ment and back pay." See, e.g., Miranda Fuel Company, 140 NLRB 181, enforcement denied, 326 F.2d 172 (2d Cir.); Cargo Handlers, Inc., 159 NLRB No. 17 (June 17, 1966). If, however, the union's breach was failure to take. grievances to arbitration, rather than actively causing discrimination against employees, the Board simply orders the union to process the grievances. Local 12, United Rubber Workers, 150 NLRB 312. The Board does not in any circumstance award punitive damages: its "power to command affirmative relief is remedial, not punitive." Republic Steel Corp. v. NLRB, 311 U.S. 7, 12.

It would be highly anomalous for the courts to award punitive damages in unfair representation cases, when the Board does not and may not.

3. The Equal Employment Opportunity Law. Title VII of the Civil Rights Act of 1964 " which deals with equal employment opportunity, provides for the same relief that is available under the National Labor Relations Act. It reads (Sec. 706(g)):

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligency by the person or

²¹ Interim earnings are deducted from back pay, and, pursuant to Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197, also amounts which the workers failed without excuse to carn."

ss Public Law 88-352, July 2, 1964, 78 Stat. 241.

persons discriminated against shall operate to reduce the back pay otherwise allowable."

Again, it would be anomalous for the courts to award punitive damages in suits for breach of the duty of fair representation under the Labor Act, but not in suits for employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

- 4. Suits Under §301. In the only case we have found on the point, the Court of Appeals for the Third Circuit, sitting en banc, held, by a divided vote, that punitive damages may not be awarded in a suit under §301. Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277. Section 303 explicitly limits recovery to "the damages by him sustained"; and this Court has held that state common law, which awarded punitive damages, was suspended by §303. Local 20, Teamsters Union v. Morton, 377 U.S. 252.
- 5. Arbitration Awards. If the union had taken Owen's case to arbitration, and, improbably, won, he would have been reinstated with back pay minus interim earnings. See e.g., United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593.

There is thus neither policy, precedent, or analogy for sustaining the award of punitive damages in this suit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

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September, 1966

TABLE OF CONTENTS

Motion of Swift & Company for Leave to File Brief As Amicus Curiae	1
Amicus Curiae Brief of Swift & Company	5
Introductory Statement—	
A. Statement of the Case	5
B. Interest of Amicus Curiae	6
C. Scope of This Amicus Curiae Brief	7
II. Summary of Argument	. 8
III. Argument—	***
A. The Opinion of the Missouri Supreme Court Sets up an Unreasonable and Unworkable Standard of Fair Representation of an Employee by a Union	8
B. Successful Collective Bargaining Procedure Requires That the Union Have the Right to Effectively Represent Its Members in the Processing of Grievances So Long As It Acts in Good Faith and Without Discriminatory Motive	15
Conclusion	18
TABLE OF CITATIONS	
Black-Clawson Co., Inc. v. International Assn. of Machinists, 313 F.2d 179 (2d Cir. 1962)	16
Humphrey v. Moore, 375 U.S. 335 (1964)	17
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)	18
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)	18
United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)	18
United Steelworkers v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960)	18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1267

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT,

Petitioners,

VS.

NILES SIPES, Administrator of the Estate of Benjamin Owens, Jr., Deceased,

Respondent.

MOTION OF SWIFT & COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Swift & Company hereby respectfully moves for leave to file a brief as amicus curiae in this case. The consent of counsel for the petitioners has been obtained. Counsel for respondent has refused his consent. The opinion of the Supreme Court of Missouri in the instant case has set up an unreasonable and unworkable standard of fair representation of an employee by a union and would allow every individual grievant who is dissatisfied with the decision of his union with respect to the processing of his particular grievance to have the decision of the union reviewed by a court or jury regardless of whether the decision of the union was made in good faith.

The opinion of the Supreme Court of Missouri strikes directly at the authority of a union to represent its members in grievance procedures and raises questions as to the authority of a union to represent its members in the collective bargaining process. Because of the impact of the question of fair representation upon the continued existence of a sound grievance procedure with the concomitant rights of a company to rely on the authority of the bargaining representative in the grievance procedure and of union representatives to exercise their judgment in the handling of a grievance, Swift & Company should be entitled to file its brief herein. The effect of the opinion of the Supreme Court of Misseuri concerns not only petitioners and unions in general but is of equal interest to Swift & Company and other employers who rely upon the authority of unions to represent their members in grievance proceedings and in the collective bargaining process.

Swift & Company desires that the Court in considering the specific issues in this case also give consideration to the broader aspects of the problems as they relate to Swift & Company and other employers who are parties to collective bargaining agreements.

The amicus curiae brief sought to be filed by Swift & Company is directed solely to the issue of the standard of fair representation of an employee by a union, and Swift

& Company does not in its brief take a position on the other issues raised in petitioners' brief.

WHEREFORE, Swift & Company prays the Court for leave to file the attached amicus curiage brief herein.

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AMICUS CURIAE BRIEF OF SWIFT & COMPANY

The amicus curiae brief of Swift & Company is submitted subject to favorable action on the motion for leave to file to which it is attached, counsel for the respondent having refused consent that it be filed.

INTRODUCTORY STATEMENT

A. Statement of the Case

The case at bar is the culmination of a proceeding instituted by Benjamin Owens, Jr., plaintiff, on February 13, 1962, in the Circuit Court of Jackson County, Missouri, at Kansas City. In this action plaintiff sought damages against the National Brotherhood of Packinghouse Workers* and Kansas City Local # 12 for failing to take his grievance against Swift & Company to arbitration. A verdict for damages in the amount of \$10,300.00 in favor of plaintiff was rendered by the jury in the trial court, but the trial court set aside this verdict on the ground that plaintiff should have taken his claim to the National Labor Relations Board. Owens died on December 8, 1964, and on the appeal of his administrator the Supreme Court of Missouri reinstated the verdict and judgment of the trial court, subject to a remittitur by plaintiff in the amount of \$300.00. The decision and opinion of the Missouri Supreme Court (397 S.W.2d 658) raised basic questions as to the nature of a union's obligations in administering the grievance and arbitration provisions of a collective bargaining agreement and as to the proper remedy for a claim that a union has failed properly to meet these obligations.

^{*}Now known as the National Brotherhood of Packinghouse & Dairy Workers.

A petition to this Court for a writ of certiorari was granted on the 6th day of June, 1966, and this Court, at the same time, pursuant to motion of Swift & Company, permitted Swift & Company to file an amicus curiae brief in support of the petition for certiorari.

B. Interest of Amicus Curiae

Swift & Company is engaged in business throughout the United States and employs approximately 45,000 persons in its United States plants and facilities. Of this total number of employees, approximately 32,000 are hourly-paid employees. Of this latter group, approximately 82.5% are in a bargaining unit for which various Unions are the collective bargaining representatives.

The petitioners involved in the case presented here were sued as representatives of and as a class representing the National Brotherhood of Packinghouse Workers* (hereinafter referred to as the "NBP & DW") and its Local No. 12 (hereinafter referred to as "Local No. 12"). The NBP & DW and its Local No. 12 are the collective bargaining agent for approximately 1,360 employees in a bargaining unit at Movant's Kansas City, Kansas, Meat Packing Plant. In addition, the NBP & DW (and one of its several local unions) represent employees of Movant in bargaining units at seven other Swift & Company meat packing plants located in the United States. At these plants, such Union is the collective bargaining agent for a total of approximately 5,600 employees.

At still other meat packing plants of Swift & Company in the United States, approximately 12,400 employees are in the bargaining units represented by either the Amalgamated Meat Cutters and Butcher Workmen of North

^{*}Now known as the National Brotherhood of Packinghouse & Dairy Workers.

America (AFL-CIO) or the United Packinghouse, Food and Allied Workers (AFL-CIO). In units and facilities of Swift & Company other than meat packing plants, there are approximately 8,400 employees in about 317 separate bargaining units which are represented by unions. In sum total, Swift & Company is signator to more than 300 collective bargaining agreements with the various unions that represent the aforementioned employees.

For Swift & Company, as for other employers whose employees are represented by unions, it is essential that the collective bargaining relationship between the employer and the unions representing its employees be a workable system. Of vital importance in such a system is the existence of an orderly method by which grievances are to be processed and handled through the grievance procedure, including the right of the employer to rely upon the authority of the grievant's union representatives to settle or withdraw a particular grievance claim at some point in the grievance procedure without processing it further when such union representatives determine in good faith that the facts of that particular grievance warrant such disposition.

It is the opinion of Movant that the decision of the Supreme Court of Missouri, particularly as it relates to the standards of fair representation of an employee by his union through the grievance procedure, seriously undermines the orderly administration of the grievance procedure in every collective bargaining agreement and thereby serves to undermine the entire collective bargaining relationship.

C. Scope of This Amicus Curiae Brief

This brief is concerned solely with the question of standard of fair representation of an employee by a union established by the Supreme Court of Misseuri in the case at bar. Movant's brief takes no position on the other questions presented by the brief of petitioners in this action.

II

SUMMARY OF ARGUMENT

The Supreme Court of Missouri permitted respondent's decedent to have judgment for damages against his union for failing to carry his grievance to arbitration on the ground that there was evidence which might have justified an arbitrator in deciding the grievance in favor of respondent's decedent and in spite of the fact that respondent's decedent in the trial court failed completely to present substantial evidence showing that the union acted in bad faith or from discriminatory motive in failing to take the grievance to arbitration.

The standard of fair representation thus established by the Supreme Court of Missouri is contrary to the opinions and decisions of this Court and the spirit and purpose of the National Labor Relations Act and, if allowed to stand, will render the grievance procedure ineffective and undermine the collective bargaining process.

Ш

ARGUMENT

A. The Opinion of the Missouri Supreme Court Sets up an Unreasonable and Unworkable Standard of Fair Representation of an Employee by a Union

The Missouri Supreme Court in its opinion (397 S.W.2d 658) never came to grips with the fundamental question of whether substantial evidence had been introduced showing bad faith on the part of the Union defendants when they did not refer plaintiff's grievance to arbitration, the

fifth step in the grievance procedure set forth in the contract between Swift & Company and National Brotherhood of Packinghouse Workers* (Plaintiff's Ex. 2; R. 19, 20, 173). The Missouri Supreme Court only considered whether there was adequate medical evidence to justify a finding that plaintiff had a meritorious grievance (R. 216, 217).

The Supreme Court of Missouri, after disposing of the preemption questions (to which it directed its primary attention), points out that one of the defendants' alternative contentions was (397 S.W.2d 658, 665):

"... that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence to show that plaintiff had a meritorious claim." (Emphasis supplied.)

The Missouri Supreme Court then (397 S.W.2d 658, 665) "concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff", but the court justified its conclusion by summarizing the medical evidence in favor of plaintiff, indicating a belief that the plaintiff made a submissible case by presenting substantial medical evidence in support of his grievance.

This approach taken by the Missouri Supreme Court was a reversal of the proper procedure, which would have involved, not a determination of whether there was substantial medical evidence supporting Owens' grievance, but whether the medical evidence supporting the Union's position was so devoid of substance as to justify a finding of bad faith on the part of the Union. Bad faith on the part

^{*}Now known as the National Brotherhood of Packinghouse & Dairy Workers.

of the National Union could not be shown merely by the presentation of medical evidence supporting the merits of plaintiff's grievance. An inference of bad faith based upon medical evidence could only be justified by a determination that there was no substantial medical evidence justifying the National Union's position. The Missouri Supreme Court simply overlooked this basic issue and, apparently inadvertently, and without regard for the consequences, established a standard of fair representation that would permit an employee to dictate the extent to which his grievance would be pursued so long as he could present any substantial evidence in support of his grievance.

Nowhere in the opinion of the Missouri Supreme Court is there any suggestion that that court ever considered the question of whether or not there was substantial medical evidence supporting the Union's position. The trial record, however, shows clearly that there was substantial (indeed, almost overwhelming) medical evidence supporting the Union's position. The original basis of Swift & Company's objection to Owens' returning to work was the opinion of Dr. Saper, the company doctor, who concluded and told Owens that Owens' physical condition was bad and his blood pressure high (R. 39, 42, 43). Although Dr. Saper was a Swift & Company doctor, there was no suggestion in the record that either he or anyone else at Swift & Company had any intention or motive to discriminate against Owens. As a matter of fact, Owens' counsel contended, and the Missouri Supreme Court found, that there was no discrimination against Owens by Swift & Company (R. 215). The opinion of Dr. Saper was later substantiated by Dr. Morris of the Kansas University Medical Center (defendant's Ex. 17; R. 48, 51, 186). The company's medical report as well as the medical report obtained by Owens (plaintiff's Exhibits 1 and 3; R. 18, 19, 172, 178, 179)

were reviewed at the fourth step meeting. At that meeting Swift & Company took the position that plaintiff's medical reports, as represented by plaintiff's Exhibits 1 and 3, were not conclusive, that they merely showed blood pressure readings, and that a full medical report was necessary (R. 136, 145). The inadequacy of these medical reports is clearly apparent from a cursory reading.

After the fourth step of the grievance procedure, when the medical evidence of the company and Owens appeared to be conflicting, the Union suggested that Owens go to a doctor of his own choosing, and that the Union would pay the doctor's bill (R. 56). After getting the recommendation of Dr. H. H. Hesser, to whom Owens went voluntarily, Owens selected and went to Dr. Hughes Day, who specialized in heart diseases (R. 57, 155). Dr. Day, following his examination of Owens, reported to the Union that Owens' physical condition was serious and that he was not able to work (R. 100, 101, 187; defendants' Ex. 18). Owens himself conceded in his testimony at the trial that he had had a congenital heart condition practically all his life; that he was born with it and all his folks died with it (R. 70, 157, 158).

Although the medical evidence supporting Owens' position was weak, it is conceivable that if the NBP & DW had taken the case to arbitration it might have prevailed, and Owens might have gotten his job back. Swift & Company does not think so. However, even if this possibility be conceded, it does not justify a finding of bad faith or discriminatory motive on the part of the Union in failing to take the grievance to arbitration. In considering the advisability of carrying the grievance to the fifth step the Union not only had the medical evidence of Swift & Company showing that Owens had severe heart damage and hypertension but also had a substantiating medical re-

port, in detail, from Dr. Hughes Day, who was a heart specialist selected by the plaintiff himself and completely unconnected with Swift & Company. The soundness of the Union's judgment in giving credence to this medical evidence is borne out by the fact that Mr. Owens died on December 8, 1964, from a "cardio vascular accident due to hypertension". It thus appears quite clearly that no factual issue of bad faith or discriminatory motive can be justified solely on the basis of the medical evidence that was in the hands of the Union at the time it determined not to carry Owens' grievance to the fifth step.

It appears, however, that respondent may be contending that a prima facie showing of bad faith was made by Owens' own testimony to the effect that named defendant Manuel Vaca told him about two months after the fourth step meetings on November 16, 1960, that the Union did not have the money to take the grievance to the fifth step and that, if Owens would give him \$300.00 to pay the arbitrator, he would take the grievance to the fifth step (R. 30, 80, 154). Owens conceded that at about the same time Vaca told him that the Union couldn't win the case in arbitration (R. 81, 82). Vaca denied having asked Owens for money (R. 126), and Owens admitted that Jamerson, business representative of the Local Union, told him he didn't have to pay money to anyone (R. 154). However, even if Owens' recital of his conversation with Vaca be accepted as true and accurate, the Vaca comments would not justify a finding of bad faith on the part of the Union. In essence they amount to no more than an expression of his belief that the Union couldn't win the arbitration and didn't have money to expend on losing cases in arbitration. It should further be noted that the alleged conversation occurred about two months or more after the original fourth step meeting on November 16, 1960 (R. 154, 155), at which the Union decided that it should arrange a rehabilitation program for Owens, looking towards rehabilitation at the Heart Association, rather than refer the matter to arbitration (R. 29); and it was after the alleged conversation that Owens, went to Dr. Hughes Day, the heart specialist, who examined Owens and advised the Union by letter dated February 6, 1961 (defendants' Ex. 18; R. 187), that Owens was in a rather serious condition and could not work. It is worthy of note that the only request made by Owens that the grievance go to the fifth step was made at the time of his informal conversation with Vaca late in January, 1961 (R. 29, 30).

In any event there was no evidence showing that Vaca had any power or authority to make a request for money or to take the grievance to the fifth step. The contract (plaintiff's Ex. 2; R. 19, 20, 173) between Swift & Company and the National Brotherhood of Packinghouse Workers provided that "the National Union may refer the grievance" to the arbitrator in the fifth step (Emphasis supplied). Vaca was president of Local No. 12 (R. 121). Vaca himself testified that as a local Union officer he had no power to decide whether or not the grievance was going to the fifth step (R. 126), and Owens himself testified that he didn't know who had the authority to take the grievance to the fifth step (R. 80). No evidence appeared in the record even suggesting that Vaca had any power or authority to determine whether the grievance went to the fifth step. Defendant Ernest F. Kobett was the representative of the National Union, and it was he who decided against going to the fifth step (R. 138, 142, 143). Likewise Kobett was the one who withdrew Owens' grievance after the National Union's president and attorney, who had reviewed the facts of the case, advised him that the case should be withdrawn (R. 138, 141).

In opposing petitioner's petition for a writ of certiorari to this Court respondent has indicated that the Executive Board voted to submit the grievance to arbitration and that the officers of the Union arbitrarily refused to follow this decision of the Executive Board (respondent's answer brief to petition for a writ of certiorari, pp. 3, 6, 19). At page 3 of respondent's said brief he quotes testimony of witness Jamerson to the effect that the Executive Board voted to take the grievance to the fifth step. Respondent failed to quote the testimony immediately following in which Jamerson stated that he could not recall whether the majority vote of the Executive Board had been in favor of arbitration (R. 94, 95), and other testimony confirmed that the Executive Board did not vote for arbitration (R. 108, 109). In any event the authority to take the grievance to the fifth step, under the terms of the contract, was lodged solely and exclusively in the National Union, and the decision not to refer the matter to the fifth step was made by defendant Kobett, the representative of the National Union (R. 134, 138, 142, 143), who had before him the medical evidence showing Owens' serious disability (R. 145, 147, 148).

It is clearly apparent from the opinion of the Missouri Supreme Court that it never seriously considered the question of whether the plaintiff had presented substantial evidence of bad faith or discriminatory motive on the part of the Union but merely considered whether the plaintiff's evidence could have created a factual issue if the grievance had been submitted to an arbitrator. The Missouri Supreme Court opinion now stands as a precedent that a Union may be liable for damages to a Union member whenever it decides not to submit a grievance to arbitration regardless of the good faith of the Union in refusing to submit the issue to the arbitrator.

B. Successful Collective Bargaining Procedure Requires
That the Union Have the Right to Effectively Represent Its Members in the Processing of Grievances So
Long As It Acts in Good Faith and Without Discriminatory Motive

The decision of the Supreme Court of Missouri in effect holds that if there is any evidence in a given case that would permit a jury to determine that a grievant had a meritorious claim, then the Union representing him may be found guilty of unfair representation in not carrying the matter through all steps of the grievance procedure and into arbitration. In effect, a jury is asked to pass upon whether or not the grievant's claim did indeed have merit after a Union in its honest judgment and with its thorough knowledge of the particular industrial scene determined that that particular grievance lacked sufficient merit to warrant further processing.

Normal processing of grievances results in an orderly disposition by the Union and the company of almost all grievances before the arbitration stage is reached; but, faced with the possibility of defending a damage suit, with all its expenses and uncertainties, brought by every unhappy grievant whose claim was not processed through the entire grievance procedure, a Union would undoubtedly choose to press a large number of grievances through the entire procedure-including arbitration-regardless of whether the grievance was meritorious or not. The impact of the Missouri Supreme Court opinion, giving in essence every dissatisfied grievant the power to insist that his grievance be processed through all five steps, can readily be appreciated from the statistics shown in the record of this case. According to the evidence in the record relating to the processing of grievances by this Union

at those Swift & Company plants where they represent the employees between September 1, 1961, and August 16, 1963, of a total of 967 grievances filed, 207 were settled in the first step, 214 in the third step, 35 in the fourth step, and only one went to arbitration (R. 138, 139). If it had been necessary to process a large number of these grievances through all five steps, the cost in time and money to the Union, the employees and the Company would have been tremendous. Worse still, it would have resulted in the complete breakdown of the orderly, workable grievance procedure which is of such vital importance to labor-management relations. This destruction of a sound grievance procedure would ultimately hurt employees, unions, and employers. Furthermore, such undermining of the authority and responsibility of the bargaining agent with respect to the administration of the collective agreement immediately could raise a question of the Union's authority in the collective bargaining process itself. It seems to necessarily follow that if every grievant dissatisfied with his Union's handling of his grievance can take his case to court, then an employee dissatisfied with any part or all of a contract negotiated by his Union could be entitled to do likewise.

In Black-Clawson Co., Inc. v. International Assn. of Machinists, 313 F.2d 179 (2d Cir. 1962), the court had under consideration the individual right of an employee, as distinguished from the right of his Union, to compel an employer to arbitrate his discharge grievance. In holding that he did not, the court in an opinion by Judge Kaufman, stated (l.c. 186):

"Our conclusion is dictated not merely by the terms of the collective bargaining agreement and by the language, structure, and history of section 9(a),

but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intraplant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. [Citing cases.] 'A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right * * *,' Ostrofsky v. United Steelworkers, 171 F.Supp. at 790, and inures to the benefit of all of the employees." (Emphasis supplied.)

Chaos will also result if every dissatisfied grievant is permitted to test the good faith judgment of his Union in a suit for damages claiming unfair representation without alleging and proving discrimination, fraud, deceit, dishonesty or negligence.

As pointed out by Mr. Justice White in Humphrey v. Moore, 375 U.S. 335, 349 (1964):

"* * we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. * * * Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Just as in *Humphrey*, in the instant case "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

This Court has emphasized the value of the grievance and arbitration procedure as a major factor in achieving industrial peace, its stabilizing influence and that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960); United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This concern for the grievance and arbitration process will go for naught if the decision of the Missouri Supreme Court as it relates to the standard of fair representation is permitted to stand. The use of grievance and arbitration procedures will become so cumbersome, time-consuming, expensive and fraught with such uncertainties and perils that it will fail to serve its purpose in the industrial complex.

CONCLUSION

The decision of the Supreme Court of Missouri establishes a standard of fair representation which seriously undermines the existence of a workable grievance procedure so necessary to the collective bargaining relationship. If it is allowed to stand as a precedent, the grievance procedure will become so meaningless and such chaos will result that the continued effectiveness of the grievance

procedure will be destroyed. The decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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INDEX

Preliminary Matters	1
Questions Actually Presented by the Case	•
Statement Supplemental to Petitioners'	5
Summary of Argument	
Summary of Argument Argument	4
Conclusion	
As to Material Cited by Petitioners	•
Conclusion	•
Supplement As to Swift and Co. Brief	_
Argument	
Conclusion10	
Supplement As to A.F.LC.I.O. Brief 10	1
Summary of This Argument10	
Argument11	
Conclusion 13	
As to Material Cited by A.F.LC.I.O., Amicus Curiae 13	•
Conclusion15	
Supplement As to Material in the Solicitor General's Brief	,
Appendix—	
Respondents' (Petitioners Here) Motion for Re- Hearing in Supreme Court of Missouri	
TABLE OF CASES	
Carey v. Westinghouse, 375 U.S. 261	
Dowd v. Courtney, 368 U.S. 502	
Erie v. Tompkins, 304 U.S. 64, 78	
Humphrey v. Moore, 375 U.S. 335	
nternational v. Gonzales, 356 U.S. 617 5, 7, 8, 9, 11, 13, 15	
nternational v. Russell, 356 U.S. 634	
ann v. United, 86 S. Ct. 657	
5 8 14 5 mith v. Evening News, 371 U.S. 195	
Inited v. LaBurnam, 347 U.S. 656	
Inited 174 v. Lucas, 369 U.S. 955	

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 114

MANUEL VACA, et al., As Officers and Members of NATIONAL (UNITED) BROTHERHOOD OF PACKINGHOUSE WORKERS,

Petitioners,

VS.

NILES L. SIPES As Administrator of the ESTATE OF BENJAMIN OWENS, JR., Deceased,

Respondent.

RESPONDENT'S ANSWER BRIEF TO BRIEF FOR PETITIONERS AND BRIEFS OF AMICUS CURIAE

PRELIMINARY MATTERS

For patent economic reasons, Respondent respectfully requests that this Court refer to "Respondent's Answer Brief to Petition for a Writ of Certiorari," filed in this case, which respondent asks leave to incorporate herein by reference (together with the Respondent's two briefs filed

in the Kansas City Court of Appeals and used in the Supreme Court of Missouri—also on file with the Clerk of the Supreme Court of the United States). This Answer Brief must, perforce, be somewhat telegraphic in content, but the points are expanded in the briefs mentioned. References to "Transcript of Record" will be marked "T".

QUESTIONS ACTUALLY PRESENTED BY THE CASE

1. Does a State Court have jurisdiction to try an action, and award actual and punitive damages, by a member against a Labor Union, where the action is based upon pleading and proof (not based upon discrimination) that the Union, as the member's agent, breached a collective bargaining agreement with his employer of which the member was one beneficiary, by arbitrarily and without just cause or excuse (and thus with legal malice) refusing to carry the member's grievance against the employer (failure to restore member to work after recovery following a voluntary layoff by reason of illness) through the fifth (arbitration) step of a grievance procedure set forth in the bargaining agreement (see opinion of Supreme Court of Missouri, en banc (T. 216, last sentence))?

STATEMENT SUPPLEMENTAL TO PETITIONERS'

Again, Respondent respectfully requests incorporation herein, by reference, of his "Statement Supplemental to Petitioners" starting at page 2 of Respondent's Answer Brief to Petition for a Writ of Certiorari.

It should be added, also that Owens had been working 12 to 14 hours a day, off and on, for the whole 16 years of his employment (T. 71); that the doctor said his whole trouble was that he was too fat and that he then took off 50 pounds (T. 15); that he "didn't have no heart attack, I just only just felt bad, I was tired" and decided to take

a rest-up (T. 15); that Owens refused to go to the rehabilitation place as "that was for people that was completely damaged." (T. 59). Owens' grievance was withdrawn by petitioners in the fourth step without notice or consent by him and about one month before trial of this case (T. 138, 142, 148), although they had copies of statements, that Owens was qualified to go back to work, from five reputable doctors who "were not questioned by the Company" (T. 141, 142). The \$300.00 was not for "costs" but for Vaca to represent Owens (T. 30) and such a request by a union official was considered by a union official as "outrageous" and "improper" (T. 127, 128). The Executive Board of the union voted to go to arbitration (T. 94).

In its opinion, the Supreme Court of Missouri did not decide the case solely on the ground that Owens had a meritorious grievance, but based the determination upon the arbitrariness and legal malice shown by all facets of the evidence (e.g. \$300.00 "lug" request (T. 208), refusal of the union to communicate with Owens' attorneys (T. 209), failure to notify Owens of withdrawal of grievance by Petitioners (T. 209), plus a meritorious grievance, etc.).

The Union had asserted that Owens' grievance was meritorious (should be put back to work) right up into the fourth step (T. 135), urging among other things, that one of the two doctors relied upon by the employer (Dr. Morris) had never seen Owens (T. 147).

SUMMARY OF ARGUMENT

This case is a simple one for actual and punitive damages growing out of an arbitrary and malicious breach of agreement by the Union to represent Owens' (an internal Union matter), as his agent in processing Owens' grievance against his employer, for wrongful refusal to restore him

to his work after he had successfully taken a voluntary lay-off to rest up and take off weight so that he would feel better. It is not based upon discrimination or an unfair labor practice, but solely upon breach of the duty of an agent faithfully, without arbitrary or malicious refusal, to act to represent his contractual principal. Efforts to twist and torture this into an action under the federal statutes concerning discriminatory acts are not in accord with the pleadings, the evidence and the submission to the jury.

The opinion of the Supreme Court properly sustains the Respondent, taking the evidence most favorable to Respondent as true, under the jury's verdict; and it is in accord with the guide lines of this Court in the Gonzales, Carey, Dowd, Humphrey, Russell, Linn, Lucas, Smith, LaBurnam and other cases.

The basic and sole premise of petitioners is that the case is based upon a discriminatory unfair labor practice by the petitioners; this is fallacious; arbitrary and malicious breach of an agent's contractual duty in an internal union matter is the foundation of the case. Both compensatory and punitive damages (not available in a Board proceeding) are proper.

The NLRB expressed itself, upon inquiry in this case, as not available for granting relief unless discriminatory action (absent here) was present.

ARGUMENT

Once more, as in "Preliminary Matters," Respondent asks the indulgence of the Court and requests reference to pages 5 through 20 of his "Answer Brief to Petition for a Writ of Certiorari."

The petition at trial level in no way pleads discrimination by an unfair labor practice; in the evidence and in the submission to the jury, there is likewise no mention thereof. As the opinion of the Supreme Court of Missouri holds, this is an uncomplicated action by an agent against his principal, under Missouri state law, for arbitrary and malicious failure to perform the principal's contractual duty, in an internal union matter to represent Owens in processing his grievance against his employer for failure to return him to work after he had successfully consummated a voluntary rest-up period from work entailing 12 to 14 hours daily labor.

The propriety of the action, judgment and opinion of the Supreme Court of Missouri, en banc, is attested to by the holdings of this Court and the guidelines there described in such cases as: International v. Gonzales, 356 U.S. 617; Carey v. Westinghouse, 375 U.S. 261; Dowd v. Courtney, 368 U.S. 502; Humphrey v. Moore, 375 U.S. 335; International v. Russell, 356 U.S. 634; Linn v. United, 86 S. Ct. 657; United 174 v. Lucas, 369 U.S. 95; Smith v. Evening News, 371 U.S. 195; and United v. LaBurnam, 347 U.S. 656,

The Supreme Court of Missouri, in its instant opinion, and properly in its own orbit, held actual and punitive damages to be proper under the law of Missouri (not in conflict with federal law and not pre-empted thereby under the facts herein). Punitive damages are recognized for malicious actions, in such cases as International v. Russell, supra. The inability of the NLRB to give complete or adequate relief is apparent, since it cannot award punitive damages or loss of future earnings and fringe benefits (e.g., in cases where the employee may, after the grievance was perpetrated, have died or become disabled). These factors are considered of moment by this Court in Gonzales, supra, and elsewhere.

It is noted that petitioners in their brief, throughout, admit that the agent must always act subject to complete good faith and honesty of purpose (not arbitrarily or maliciously) in the exercise of its discretion (their Brief pages 24, 25, 34, 37 and 38), even in discrimination cases. This is especially necessary in those cases, as in simple principal and agent cases, where an exclusive representation agreement (as here, page 26 of Petitioners' Brief) is involved. Petitioners surely will not go so far as to argue that arbitrary and malicious conduct is consonant with good faith and honesty of purpose. Yet the jury held that the evidence showed such conduct and the highest court in the state (ruling under Missouri law as to this point, see Erie v. Tompkins, 304 U.S. 64, 78) sustained the jury's verdict. This is much more than understandable with the evidence of a meritorious grievance in which the agent acted as follows: abandoned by Petitioners after they had believed in its merit through the fourth step presentation; balking only at the first step where a neutral arbiter would hear the grievance (arbitration); demanding an "outrageous" and "improper" "lug" of \$300.00 as a prelude to continuing; refusing to continue to arbitration even though the Executive Board had so decided; refusing to answer the inquiries and requests for action of Owens' attorney; and arbitrarily, without knowledge of or notice to Owens, about five weeks before this trial, withdrawing his grievance completely. Is this a picture consistent with an agent's good faith and honesty of purpose, and does it indicate a decision made within a wide range of reasonableness!

Even were this a discrimination matter, Petitioners present an ambivalent position as to whether an action will lie where a union fails in its duty as an agent, stating that a "suit" will lie (pages 16, 28, 50 of its Brief), but else-

where plumping for pre-emption by the NLRB (pages 15 and 39 of its Brief). Still, however, it ignores the basic and unchanged holding of this Court in Gonzales, supra, as to the field outside of the Board-pre-empted area, in which the original jurisdiction of the State Courts has not been disturbed.

CONCLUSION

Thus, petitioners having misconceived the basis of the instant action, their Brief, founded entirely upon a discriminatory picture is inapropos to the situation here presented.

As to Material Cited by Petitioners

The following points are noted in cases and material cited by petitioners in their "Brief for Petitioners," in addition to those discussed on page 14 et seq. of "Respondent's Answer Brief to Petition for a Writ of Certiorari."

At page 26 Palnau, 301 F. 2d 702, is cited; it restates the law, hn. 7, page 705, that individual rights of employees under a collective bargaining agreement may be adjudicated in a State Court, citing Dowd, supra.

At page 48 Petitioners cite Elgin, 325 U.S. 711, in support of the proposition that an individual may sue his employer for a grievance growing out of breach of contract; if he may so sue his employer, of course, it is even more logical that he may sue the union for failure so to act for him. Petitioners admit this apparently, in their top paragraph, page 28, where they state that federal law (but not forum) governs where a collective bargaining agreement action is brought in a state court.

On page 41, petitioners again speaking under their discrimination premise, discuss the reversed Miranda NLRB decision. Yet in Owens' case, he checked with the NLRB but found that it would not entertain his grievance against a union unless discrimination was a factor (T. 195, 196).

On page 44, petitioners admit that "state courts may remedy certain types of violations of state law even though the same conduct may be an unfair practice," citing Russell, LaBurnam, Linn and Smith, supra, and even giving recognition (though quite cavalierly) to Gonzales—the leading and decisive case under these facts.

On page 45, they admit in their last full paragraph, that no opportunity was ever given to the State Courts to rule upon the appropriateness of an award of damages—since no challenge thereto was made. There thus is no issue on that score at this stage

CONCLUSION

While respondent applauds the historical and explanatory elements of the large portion of petitioners' Brief, as constituting a well-written treatise on labor relations, he must suggest strongly that the portion purporting to relate to the facts in this case is founded upon the entirely baseless and fallacious premise that this action is based upon a violation of a federal statute against unfair labor practices involving discrimination. Instead, the basis is an action founded upon violation of State law as permitted and authorized by this Court in Gonzales, Carey, and many other cases. It is urged that Certiorari be denied.

Respectfully submitted,

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SUPPLEMENT AS TO SWIFT AND CO. BRIEF

Respondent again, for obvious economic reasons, respectfully requests that this court consider page 21 of his Answer Brief to Petition for Writ of Certiorari as incorporated herein, by reference.

ARGUMENT

This case was brought and submitted under the common law, not as a discriminatory action, but as a breach of contract by an arbitrary and malicious failure by an agent to represent his principal. The standard is arbitrary · and malicious action. A definite standard of the common law for assessment of liability is reiterated (not "set up," since this has always been the common law standard) by the Supreme Court of Missouri, i.e., an agent is liable to its principal for arbitrary and malicious failures properly to represent the principal ("discrimination" was nowhere pleaded or submitted in the case; see opinion page 215, Transcript of Record). The employer's effort is to twist the nature of the proceeding away from its true basis, recognized by the highest court of the state of Missouri as an action under the common law for wrongful (arbitrary and malicious, not discriminatory) breach of the union's contractual duty as respondent's agent to represent its member (an occurrence involving the internal operations of the Union), attempting to effect a metamorphosis into a discriminatory (favoring one over another) action,

The employer's Brief, therefore, like the others, is based upon a begged question and a false one. The standard here is not discrimination vel non, but arbitrary and malicious common law failure by an agent faithfully under its contract, to represent a principal (see discussion of International v. Gonzales, 356 U.S. 617 on pages 211-216, Transcript of Record).

The Missouri Supreme Court's opinion found that in addition to Owens' good submissible case for retention on the job, there were such matters of importance as facets of arbitrary and malicious action by the agent as the \$300.00 "lug," failure to communicate with Owens' attorney (and in the evidence, in addition, are matters such as overruling the vote of the board of directors of the Union, etc.). The opinion did not "set up" as a standard the good submissible case against the employer as the sole criterion of arbitrary and malicious action (see Transcript of Record, pages 208, 209 re "lug", failure of Union to communicate with respondent, and page 94 as to Board Decision to go to Fifth step).

CONCLUSION

The common law standard for wrongful failure by an agent to represent his principal by reason of arbitrary and malicious acts was the basis of the Missouri Supreme Court decision.

SUPPLEMENT

As to A.F.L.-C.I.O. Brief

Once more, Respondent respectfully requests this court to consider pages 23 and 24 of his Answer Brief to Petition for Writ of Certiorari, as incorporated herein by reference.

SUMMARY OF THIS ARGUMENT

This Amicus Curiae Brief, like the others, attempts to twist and transmute a simple common law action for wrongful (arbitrary and malicious) failure by an agent faithfully to represent its principal (in an internal union matter) into a discriminatory action based upon violation of specific federal statutes. The Brief's premise thus being

false, its involved and at times rather obscure arguments based thereon also are unsound. International v. Gonzales, 356 U.S. 617, is the solid basis of the Missouri Supreme Court's Opinion and the facts of the case and the opinion fall directly under the holding of this court in the Gonzales case. The arguments of the AFL-CIO Brief, even on such false premise, lack integrity in that on pages 3, 4, 5 and 12 of that Brief they take positions that respondent can maintain his action, while contrari-wise nimbly announcing that they are preparing to jump in reverse upon a later anticipated legal occasion.

The "Standard of Liability" argument is covered in "Respondent's Argument as to Swift and Co. Brief," immediately preceding this argument.

While a union has reasonable latitude in refusing to process a grievance if acting in good faith, as the Brief asserts, this very statement implicitly includes that it may not so refuse if acting arbitrarily and maliciously as to a just grievance.

The argument is still based upon the false premise that this is a "discriminatory" action. Punitive damages have always been allowable by courts as punishment and deterrents at common law, in cases involving arbitrary and malicious acts; even were this a discrimination case, the absence of power in NLRB to award such relief is a strong justification for the use of Courts in cases warranting it.

ARGUMENT

The Missouri Supreme Court's opinion (see preceding Answer to Swift & Co. Brief) made crystal clear that this was a common law action justified under the expressions in Gonzales and not one based upon violation of or under

specific federal statutes. Discrimination was not pleaded, proved, or submitted; arbitrary and malicious failure by an agent (the union) to do its duty to this principal under a contract (internal matter of the union) was the hoof and horn of the case. While the admissions by the Brief are that respondent is wrong, but may be right here, and that the writer will contend at a later occasion that respondent's position is correct under the federal statutes (confusing, to put it mildly) such support as this affords respondent still rises from a false foundation (discrimination action vis-a-vis common law breach of contractual agency duty). Throughout, it must be remembered that the NLRB is on record that discrimination must be shown to have been caused by the union before there is a violation of Section 8(a) (3) NLRA (Transcript of Record, Page 195).

The "standard of liability"—arbitrary and malicious failure to act as a faithful agent—is neither novel nor incorrect. Previous argument on this point need not be reiterated.

The Brief plumps for single jurisdiction of a "dispute", page 23, in the NLRB while admitting the sterility of the Board's power to give complete relief, its inability to enjoin, to award punishing or deterrent sanctions, and otherwise to protect employees against just such arbitrary and malicious actions (\$300.00 "lug", overruling the union Board's Decision, refusal to communicate with the employee, etc.) as occurred here. It wishes, it says, to avoid "forum shopping," while seeking to locate all remedies, even for wrongful, intentional, arbitrary, wanton, and malicious actions its union or others may choose to take against their own members to a body which it happily asserts can do nothing to punish such actions.

On page 34, the Brief cites Equal Employment Opportunity Law as an example of federal desire not to use punitive action to control tyrannical type actions by labor unions. However, the quotation discloses the reverse, for the law provides that a Court for an unlawful employment practice may order back pay for an employee "payable by the labor organization * * * responsible for the unlawful employment practice" (Emphasis added).

Again, using the false "discrimination" premise, the Brief speaks of the good faith latitude of a union to refuse to process grievances. But this "good faith" is implicit in the discretionary power, and the arbitrary and malicious absence thereof is the crux of the liability involved in the instant case. Citation by the Brief of ex parte figures of cases "settled" (no showing how many or few were "dropped") adds nothing to the picture, for the overriding question would be whether those "dropped" were dropped arbitrarily or maliciously like the Owens' grievance. If they were, the victim should have a remedy, and punitive action should be available

CONCLUSION

The false premise of the Brief is "discrimination". This action, however, is a common law action for faithless failure by an agent, based upon arbitrary and malicious acts falling directly under the *Gonzales* holding. The punitive feature is properly available to courts, but missing from the NLRB's powers.

As to Material Cited by AFL-CIO, Amicus Curiae

The following points are noted in cases and material cited by Amicus Curiae, AFL-CIO, in their Brief, in addition to those discussed on pages 22 et seq., of "Respondent's Answer Brief to Petition for a Writ of Certiorari."

At page 4, they admit that a state court may entertain a "suit" under federal statute for breach of the bargaining agreement, even though the breach is also an unfair labor practice; of course, this is fine, as far as it goes, but in Gonzales, etc., this Court puts its imprimatur also upon common law actions like the instant one.

On page 11, they cite Local 357 v. NLRB, 365 U.S. 667, again, a case dealing with discrimination. It may be noted that Mr. Justice Clark described "discrimination" as meaning to "distinguish" or "differentiate." Of this, there was no evidence in the instant case.

On page 12, they join the petitioners in taking ambivalent positions; they boost the theory that breach of duty of fair representation is arguably an unfair labor practice, while admitting that elsewhere they claim the reverse. By "arguably" they must mean that because anyone (they in this instance) argues the point antithetically, it enters that category. The term must mean more than that. It must mean that the point may be logically argued with reasoning of substance. Otherwise, everything is "arguable." In the instant case, the point is moot.

On page 19, they admit that "breach of contract is not itself an unfair labor practice" and on page 20, cite smith, supra, that even if violation of the duty of fair representation is an unfair labor practice, the action for breach of contract (this is such an action) is cognizable in State Courts.

On page 28, they cite Atkinson, 370 U.S. 238. There this court held that an action under §301 LMRA (not the case here) is controlled by federal law whether brought (violation of bargaining agreement) in either federal or state courts.

CONCLUSION

For the reasons suggested above, it is again urged that certiorari be denied.

SUPPLEMENT

As to Material in the Solicitor General's Brief

This Brief, amicus curiae, requested by this Court of the Attorney General, appears to adopt and range itself almost completely with that filed by AFL-CIO; therefore, the Court is respectfully referred to respondent's adversions to these points in his Brief. While the position of such a formidable office is most impressive to respondent, speaking, as it states, from its position "expressing the views of the United States" (though we should have considered it to be only of the Executive Branch), still, the law of the Gonzales and other cases remains undisturbed by the arguments in the Brief-this, for the reasons advanced earlier. herein. Although an attorney with the NLRB is on the Brief, the position in which he appears now to join was not the position of the NLRB when Owens, in timely fashion, originally requested light thereon (T. 195, 196, and Solicitor General's Brief, p. 32), and they stated that the only cases of which they would take cognizance were those involving discrimination.

The following statement in the Brief, as to the evidence the jury considered, requires limited correction: on page 4, the testimony (T. 30) was that the Local President wanted \$300.00 "to represent me for the fifth step," not "for the cost of arbitration" (also T. 154).

Respondent respectfully disputes the Brief's p. 6 statement that neither the complaint (petition) nor the State Court opinions stated the legal nature of the claim—the petition was drawn (T. 1, 2 and 4) as for a breach of the

contract by an agent faithfully to represent his principal (a common law duty), and the Missouri Supreme Court opinion followed this characterization (T. 215, 216). While, as the Brief states, p. 8, there is a federally cheater statutory duty, it has not, of course, deleted the ancient parallel common law responsibilities. "Rank hath its privileges; and rank hath its responsibilities." The Brief, like the others, is chained to the incorrect premise that the petition, instructions and verdict are based upon an unfair labor practice by discrimination, based upon the LMRA. It also disregards the touchstone of the Missouri Supreme Court opinion, that the standard for assessing the common law liability is arbitrary and malicious conduct.

On page 15, the Brief asserts that the "complaint" alleged in substance that the union "unfairly" represented Owens. The quoted word (a word of art in this climate), however, does not appear in such a frame.

As to Owens' letter to the NLRB, p. 15, Note 7 of the Brief, it was written during the period when his attorney was unable to secure any answers from petitioners as to the status of his grievance.

Possibility of differences in findings as to matters handled in divergent jurisdictions occurs in cases in all courts of the Nation and its States; yet this is controlled, in reason, by appellate procedures and has never been suggested as a reason for centralizing all litigation of the Nation and States in a single Board or Juridical Body—the logical terminus of the Brief's argument.

On page 21, the Brief makes a most important admission, which goes to the very fundamentals of the case, i.e. that "were there a contractual standard," formulated by the union, the State court would have jurisdiction. Owens pleaded such a contractual situation (T. 2) and violation

of the contractual duty to represent, by refusal "to pursue further the just claim" (T. 4). Petitioners' own testimony on this score was accepted by the jury, to the effect that petitioners had the *duty* faithfully to represent the employees in any grievance against the employer, without charge (T. 113) under the Union rules (T. 114).

Respectfully submitted,

ALLAN R. BROWNE
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1122 Professional Building
Kansas City, Missouri
Attorneys for Respondent

APPENDIX

Respondents' (Petitioners Here) Motion for Re-Hearing in \/ Supreme Court of Missouri

Comes now respondents and respectfully move the court to set aside its decision and opinion herein and grant a rehearing of this cause on the following grounds:

1. Because the Court in holding that the alleged conduct of the respondents or defendant union could not be argued to constitute an unfair labor practice in violation of Section 158, of the Labor Management Relations Act, as amended (29 U.S.C.), the Court has failed to follow, and its opinion and decision are in conflict with, Ironworkers v. Perko, (1963) 373 U.S. 701; Plumbers' Union v. Borden, (1963) 373 U.S. 690; Hughes Tool Company, (1953) 104 N.L.R.B. 318; Administrative Ruling of N.L.R.B. General Counsel (1960) 47 L.R.M. 1034; Administrative Ruling of N.L.R.B. General Counsel (1961) 47 L.R.R.M. 1226-1227; and Administrative Ruling of N.L.R.B. General Counsel (1961) 47 L.R.R.M. 1602-1603; and Local 12, United Rubber Workers, 1964, C.C.H.N.L.R.B., §13,655, wherein it has been held that the wrongful refusal by a labor organization to handle or process a grievance constitutes an unfair labor practice under the aforesaid act, and which said decisions and propositions therein announced are decisive of this case, and which were duly submitted by counsel for the respondents at pp. 12, 14-16, 18-23, 24, 26.

WHEREFORE, respondents respectfully pray that their motion be sustained and a re-hearing granted.

HENRY A. PANETHIERE
RUSSELL D. JACOBSON
1700 Home Savings Building
Kansas City, Missouri
Victor 2-1688
Attorneys for Respondents

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 114

THE STREET IN TAXABLE LIVE

MANUEL VACA; ET AL., PETITIONERS

NILES SIPES, ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS

In our brief amicus curiae we referred (pp. 10, 12, 18) to the decision of the National Labor Relations Board in Local 12, United Rubber Workers, 150 NLRB 312. On November 9, 1966, the United States Court of Appeals for the Fifth Circuit upheld and enforced the Board's order in that case. The court's opinion is attached.

Respectfully submitted. Partitioner United

Husber Cook Language THURGOOD MARSHALL, America Solicitor General.

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United States Court of Appeals FOR THE FIFTH CIRCUIT

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LOCAL UNION NO. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERI-CA, AFL-CIO,

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NATIONAL LABOR RELATIONS BOARD, Respondent. o', perseque '\$1 decentrine, receptor o-

Petition for Review of Order of the National Labor Relations Board, sitting at Washington, D. C. (Alabams Case.) diw sgavolgine stilly gave alder

(November 9, 1966.) dulle, benefitte lavoirs and recult. Also as a matter

Before RIVES and THORNBERRY, Circuit Judges, and GARZA, District Judge.

THORNBERRY, Circuit Judge: Petitioner, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, Local Union No. 12 (hereinafter referred to as Local 12), initiated these proceedings to

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review a determination by the National Labor Relations Board that Local 12 had engaged in unfair labor practices within the purview of sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Labor Management Relations Act, 61 Stat 136 (1947), as amended, 29 U.S.C. § 141, by refusing to process certain grievances of eight Negro employees in its bargaining unit at Goodyear Tire & Rubber Company of East Gadsden, Alabama. The facts underlying the controversy are virtually undisputed.

Local 12 has been the exclusive collective bargaining representative of Goodyear's East Gadsden plant employees since 1943. Until March 1962, three separate seniority rolls-white male, Negro male, and female were maintained, although the bargaining contract between Goodyear and Local 12 appeared to provide for plantwide seniority without regard to race or sex. As a matter of custom and interpretation during this period, Negro employees with greater seniority had no rights over white employees with less seniority, and vice versa, with respect to promotions, transfers, layoffs, and recalls. Also as a matter of custom, racially separate plant facilities such as lunchrooms, restrooms and showers were maintained, although no provision in the bargaining contract dealt with such matters In Circuit Justiland days directly

The eight complainants were laid off in August or September 1960, and were retailed approximately one year later. In October 1961, Buckner, one of the eight complainants, having been notified that he was to be again laid off, inquired why a white employee

with less seniority continued to remain employed. He was informed by the assistant manager of Goodyear's labor department that the posted job was a "white job." Thereupon, Buckner and the other complainants, who were also in layoff status, executed affidavits that during their period of layoff subsequent to August or September 1960, new workers had been hired in violation of plant seniority rules. These affidavits were forwarded to the President of Local 12, requesting that Local 12 investigate the alleged grievances and take remedial action. The complainants appeared before the grievance committee on December 8, 1961, and presented a more complete "Statement of Complaint" which charged (1) that the original layoff and recall had not been in accordance with contract-stated seniority and that complainants demanded reinstatement with back wages, (2) that upon recall complainants wanted all transfer privileges as set forth in the contract, and (3) that complainants demanded the right to all plant privileges without color barriers. The committee concluded that "no contract violation exists, therefore, the Union has no ground on which to base a complaint against the company." Subsequent appeals to the union executive board and the full union membership were likewise denied. In March 1962, complainants appealed the action of Local 12 to George Burdon; the union's International President. In light of the information requested by Burdon, and provided by the complainants and Local 12, he concluded that the decision refusing to process the grievances should be reversed.

While Local 12 continued to refrain from filing a formal grievance, the record reflects that in the latter part of March 1962 union representatives met with company officials and a representative of the President's Committee on Equal Employment Opportunity to discuss the racially segregated employment practices. These discussions apparently culminated in a verbal agreement between Local 12 and Goodyear to discontinue any application of the bargaining contract which confined Negro and white employees to particular jobs and restricted opportunities for upgrading, recall, and transfer to jobs theretofore separated on racial lines. Complainants were reinstated and there is no evidence that any racially discriminatory practices with regard to job opportunities, transfer, promotion, layoff, or participation in Goodyear's training program existed after March 1962. It is further clear from the record, however, that Local 12 continued to refuse to process the grievances concerning back wages for the period of layoff occasioned by application of the seniority system in effect prior to March 1962, as well as those concerning the continued segregated nature of plant facilities.2 Accordingly, on October 22, 1962, the initial unfair labor practice charges were filed against Local 12.

¹ Established by Exec. Order No. 10925, ..., Fed. Reg. (1961).

As late as July 13 and July 16, 1962, Local President Bowers continued to refuse to take action upon these claims. Joint Appendix, pp. 42, 96. Such conduct clearly fell within the six-month period preceding the filling of the initial unfair labor practice charge and petitioner's claim that the charges were untimely within contemplation of section 10(b) of the act is therefore unfounded.

In reversing the trial examiner's determination that no unfair labor practice had been established, the Board concluded that petitioner, by refusing to process the grievances concerning back wages and segregated plant facilities, had thereby (1) restrained or coerced complainants in their section 7 right to be represented without invidious discrimination, (2) caused or attempted to cause Goodyear to discriminate against complainants, and (3) refused to bargain in complainants' behalf, thus violating sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the act. Petitioner was accordingly ordered to process the grievances through arbitration and to propose to Good-

Section 8(b)(1)(A) provides that

Section 7 provides that

Rimployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities 61 Stat. 140 (1947), 29 U.S.C. § 157.

Section 8(b)(2) provides that

It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) 61 Stat. 141 (1947), as

violation of subsection (a)(3) 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b).

amended, 29 U.S.C. § 158(b).

Section 8(a) (3) provides that

It shall be an unfair labor practice for an employer

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage of discourage membership in any labor organisation

49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a).

Section 8(b) (3) provides that

It shall be an unfair labor practice for a labor organisation or its agents

(3) to refuse to bargain collectively with an employer

61 Stat. 141, 29 U.S.C. § 158(b).

year specific contractual provisions prohibiting racial discrimination in terms and conditions of employment pursuant to the oral agreement of March 1962. From that order Local 12 petitions this Court for review.

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The facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employee rights and the continued effectiveness of the collective bargaining process; Essential to an adequate analysis of any issue involving the scope of union responsibility to those it represents is the recognition that administration of internal union affairs constitutes a significant element in the collective bargaining process. Accordingly, the vital issue in this area resolves itself into that of determining at what point the exclusive bargaining agent's duty to represent fairly the interests of each individual employee must bow to the equally comprehensive obligation of negotiating and administering the bargaining contract in accordance with the act's primary policy of fostering union-employer relations. While the Supreme Court has declared that an exclusive bargaining agent is responsible to, and owes complete loyalty to, the interests of all whom it represents," Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048,, it has at the same time recognized the inherent burden this mandate serves to impose upon a union obliged to exercise good faith in adjusting the numerous competing interests of its individual members:

Inevitably differences will arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ibid. Nevertheless, when the individual employee, pursuant to federal law aimed at preserving industrial harmony, is required to surrender completely his right of self-representation in deference to an "exclusive" bargaining agent designated by a majority of his coworkers, both logic and equity dictate that such agent be impressed with a reciprocal duty to "represent all its members, the minority as well as the majority, and ... to act for and not against those whom it represents." Steele v. Louisville & N.R.R., 1944, 323 U.S. 192, 202, 65 S.Ct. 226, 232, 89 L.Ed. 173,; see Hughes Tool Co, v. NLRB, 5th Cir. 1945, 147 F.2d 69, 74. Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation. Steele v. Louisville & N.R.R., supra, 323 U.S. at 198-99, 65 S.Ct. at 230, 89 L.Ed. at

Although the concept of "fair representation" is generally thought of as having arisen initially in Steele v. Louisville & N.R.R., which involved a controversy under the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. 151, the Supreme Court on that same day declared an identical duty to be implicit in section 9(a) of the National Labor Relations Act.4 Wallace Corp. v. NLRB, 1944, 323 U.S. 248, 65 S.Ct. 238, 89 L.Ed. 216. Subsequent decisions, moreover, have further confirmed the principle that this duty of fair representation constitutes a fundamental limitation upon union activity under the act. E.g., Humphrey v. Moore, 1965, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; Syres v. Oil Workers Union, 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 285, reversing 5th Cir. 1955, 223 F.2d 739; Ford Motor Co. v. Huffman, supra. Therefore, we are not here called upon to establish such duty but rather to face the issue of what conduct represents a breach of that duty, together with its appropriate remedy. More specifically, we must determine whether a breach of the duty of fair representation in itself constitutes an unfair labor practice within contemplation of the National Labor Relations Act, as amended. We are convinced that the duty of fair representation implicit in the exclusive-representation requirement in section 9(a)

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

49 Stat. 452 (1985), as amended, 29 U.S.C. i 159(a).

of the act comprises an indispensable element of the right of employees "to" bargain collectively through representatives of their own choosing" as guaranteed in section 7. We therefore conclude that by summarily refusing to process the complainants grievances concerning back wages and segregated plant facilities, petitioner thereby violated section 8(b)(1)(A) of the act by restraining those employees in the exercise of their section 7 rights.

At the outset it must be reiterated that every union decision which may in some way result in overriding the wishes or disappointing the expectations of an individual employee, or even an appreciable number of employees, does not in and of itself constitute a breach of the fiduciary duty of fair representation. Even in the administration stage of the bargaining contract, when the necessity of adjusting competing employee claims may not be as pressing as during the segotiation stage where rigorous scrutiny of each compromise might frustrate the act's policy of encouraging industrial peace, the union must necessarily retain a broad degree of discretion in processing individual grievances. Thus, where the union, after a good faith investigation of the merits of a grievance, concludes that the claim is insubstantial and refuses to encumber further its grievance channels by continuing to process the unmeritorious claim, its

^{739-41 05} S.Ct 1262 1297-98, 89 L.Ed. 1888, where the Supreme Court indicated that a union's discretion in compressions individual claims in the administration stage of the bergaining contract may not be an broad as in the negotiation stage.

duty of fair representation may well be satisfied. Such good-faith effort to represent fairly the interests of individual employees, however, is not evidenced in this controversy. To the contrary, Local 12 in open disregard of the recommendations of its International President has continued to refuse to represent the vital interests of a segment of its membership. The claims with regard to back pay and segregation of plant facilities clearly concern meritorious issues involving wages and conditions of employment, issues with respect to which these employees have relinquished to the union as exclusive bargaining agent their individual rights to negotiate. See J. I. Case Co. v. NLRB, 1944, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762. Neither does the mere fact that the act provides that an individual employee may present his claim directly to the employer' diminish the union's duty of

It is reasonable to assume that the General Counsel of the Board, pursuant to the discretion invested in him under section S(d) of the act, will refuse to issue a complete against a union when an employee claim is clearly without merit. Indeed, at least four unfair representation claims were dismissed as being baseless during the period between Mirands Fuel Co. 1962, 140 N.L.R.B. 181, and Independent Metal Workers Union. 1964, 147 N.L.R.B. 1873, the first two cases in which the Board heid a breach of the duty of fair representation to be an unfair infor practice. Armored Car Chauffers Union, 145 N.L.R.B. 225; New York Typographical Union, 1963, 144 N.L.R.B. 1865; Millwrights Union, 1963, 144 N.L.R.B. 1865; Millwrights Union, 1963, 144 N.L.R.B. 1865; Millwrights Union, 1963, 140 N.L.R.B. 1287

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fair representation, for admittedly the grievance of a single employee can have little force in the absence of support from his bargaining representative. Cohley v. Gibson, 1957, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 30, Undoubtedly, the duty of fair representation can be breached by discriminatory inaction in refusing to process a grievance as well as by active conduct on the part of the union. Conley v. Gibson, supra, Steele v. Louisville & N.R.R., supra, 323 U.S. at 204, 65 S.Ct. at 226, 89 L.Ed. at ...; Hughes Tool Co. v. NLRB, supra note 3. The Supreme Court has declared that

The bargaining representative's duty ... does not come to an abrupt end ... with the making of an agreement between union and employer. Collective bargaining is a continuous process. Among other things, it involves day to-day adjustments in the contract and other working rules, resolution of new problems not covered by the existing agreements, and the protection of employee rights already secured by contract. The bargaining representative

While the Supreme Court has ruled that the employee must attempt to pursue the grievance procedure set forth in the bargaining contract before seeking other ramedies, Republic Steel Corp. v. Maddox, 1965, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 550, substantial doubt exists concerning the extent of the employee's "right" to compel his employer to comply with the grievance and arbitration provisions in the tergaining contract when his mion returns to represent him. See Black-Clawson Co. v. International Ass'n of Machinists, 2d Cir. 1962, 313 F.2d 179; Ostrofsky v. United Steelworkers, 2d Cir. 1962, 313 F.2d 179; Ostrofsky v. United Steelworkers, D. Md. 1969, 171 F.Supp. 782, aff'd, 4th Cir. 1960, 273 F.2d 614, cort. denied, 1960, 363 U.S. 840, 80 S.Ct. 1244, 4 L.Ed. 2d 1150; But are Haghes Tool Co. v. NLRE, 5th Cir. 1945, 147 F.2d 69; Connells v. United Fruit Co., N.J. 1963, 160

can no more discriminate in carrying out these functions than it can in negotiating a collective agreement.

Conley v. Gibson, supra, 355 U.S. at 45, 78 S.Ct. at 102, 2 LEd.2d at

In defense of its refusal to process the claims for back wages arising during the period when seniority was applied on a racial basis, the union argues that since those practices have been abandoned, recognition of the back wage claims for that period would in effect render its decision to abandon the practices retroactive. It thus contends that its choice to reject the claims in order to avoid such effect was not based upon considerations of an arbitrary or unfair nature. Significantly, however, from 1943 to March 1962 the union consistently adhered to the practice of applying seniority on a racial basis, conduct which manifested a patent breach of its duty of fair representation. As the Supreme Court in Steele observed:

The statutory power to represent a craft and to make contracts as to wages, hours, and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. [D]iscriminations based on race alone are obviously irrelevant and invidious.

Contry o. Gibson, supra; see Brotherhood of Ry.

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Trainmen v. Howard, 1952, 343 U.S. 768, 72 S.Ch. 1022 96 L.Ed. 1283; Tunstall v. Brotherhood of Lecomotive Firemen, 1944, 323 U.S. 210, 65 S.Ch. 235, 89 LEEd. 187, Syres v. Oil Workers Union, 5th Cir. 1955, 223 F.2d 739, 745 (Rives, J., dissenting), revid per curians. 1955, 350 U.S. 892, 76 S.Ct. 152, 400 L.Ed. 785 Ap the Board properly concluded, had the claims been allowed to proceed to arbitration, and arbitrator would not have been bound by the prior invalid interpretation, of the contract and might well have awarded back wages. We thus conclude that where the record demonstrates that a grievance would have been prooessed to arbitration but for arbitrary and discriminatory reasons, the refusal to so process it constitutes a violation of the union's duty to represent its members "without hostile discrimination, fairly, impartially, and in good faith." Steele v. Louisville & N.R.R., supra, 323 U.S. at 204, 65 S.Ch. at 226, 89 L. Cir. 1963, 326 F.28

Similarly, with respect to the grisvances concerning the segregated nature of plant facilities, the union not only refused to process such claims but actively opposed desegregation of shower and tollet facilities. It is impossible for us to look upon such conduct as anything other than an effort to discriminate against Negro employees with respect to conditions of employment. As exclusive representative of all employees in the bargaining unit, Local 12's statutory obligation required it to make an honest effort to here

See Letter Loon Local Problem Books of the national Practicant Burdon, July 18 1902 John Louisian D. 183.

the interests of all its members, without hostility to any." Ford Motor Co. v. Huffman, supra, 345 U.S. at 337, 73 S.Ct. at 686, 97 L.Ed. at . . . In summarily refusing to consider in good faith the merits of these grievances, the union's conduct inarguably failed to meet this standard. As the Board properly concluded, "whatever may be the bases on which a statutory representative may properly decline to process grievances, the bases must bear a reasonable relation to the Union's role as bargaining representative or its functioning as a labor organization; manifestly racial discrimination bears no such relationship." 150 N.L.R. B. 312, 317.

We have been able to find but one appellate decision on the specific issue of whether a breach of the union's duty of fair representation constitutes an unfair labor practice. NLRB v. Miranda Fuel Co., 2d Cir. 1963, 326 F.2d 172. That decision, moreover, was comprised of three separate opinions. 10 Careful study of those opinions and the briefs in this case, in conjunction with the thorough and well-reasoned commentaries in this area, 11 convinces us that Local 12,

Lembard wrote a concurring opinion, and Judge Friendly dissented.

Sented.

January Pair Representation. 22 Ohio St. L.J. 39 (1961); Albert, NIRB-FEPC, 16 Vand L.Rev. 547 (1963); Blumrosen, The Vol. Waster and Three Phases of Unionism 61 Mich. L.Rev. 1435 (1963); Cox. The Duty of Fair Representation, 2 Vill. L. Rev. 681 (1967); Hamslowe, The Collective Agreement and the Duty of Fair Representation, 1963 Lab. L.J. 1052; Herring, The 'Pair Representation' Doctrine, 24 Md. L.Rev. 113 (1964); Murphy The Duty of Fair Representation Under Sails Harring, 30 Mo.L.Rev. 373 (1965); Sherman, Union's Duty of Fair Representation under Life Harring, 30 Mo.L.Rev. 373 (1965); Sherman, Union's Duty of Fair Representation and the Civil Rights Act of 1964,

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in refusing to represent the complainants in a fair and impartial manner, thereby violated section 8(b) (1)(A) by restraining them in the exercise of their section 7 right to bargain collectively through their chosen representatives. The mere fact that Local 12's conduct may not have directly resulted in encouraging or discouraging union membership does not persuade us to alter our determination, for the language of section 8(b)(1)(A), unlike certain other provisions of section 8, is not restricted to discrimination which encourages or discourages union membership.

It is upon this point that we must respectfully decline to concur in the reasoning of Judge Medina in NLRB v. Miranda Fuel Co., supra, that since section 8(b)(3) was intended as merely a counterpart of the employer's duty to bargain collectively under section 8(a)(5), and since section 8(b)(2) requires a showing of discrimination by the employer under section

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⁴⁹ Minn. L.Rey. 771 (1964); Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L.Rey. 563 (1962); Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda, N.Y.U. 16th Annual Conference on Labor 3 (1963); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L.Rev. 362 (1962); Welsa, Federal Remedies for Racial Discrimination by Labor Unions, 50 Geo. L.J. 457 (1962); Wellington, Union Democracy and Fair Representation, 67 Yale L.J. 1327 (1968); Comment, Discrimination and the NLRB, 32 U. Chi. L. Rev. 124 (1964); Comment, Racial Discrimination and the Duty of Fair Representation, 65 Column L.Rev. 273 (1965); Note, Administrative Enforcement of the Right to Fair Representation, 412 U.P.L.Rev. 711 (1964); Comment, Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation, 26 U. Pitt. L. Rev. 505 (1965); Note, Federal Protection of Individual Rights Uniter Labor Contracts, 73 Yale L.J. 1215 (1964).

8(a)(3) which serves to encourage or discourage union membership, Congress must have intended that the application of section 8(b)(1)(A) should also be limited to conduct affecting union membership.18 This argument that section 8(b)(1)(A) should thus be restricted because section 7 rights are limited by these other enforcement provisions of section 8 is, as has been pointed out by one commentator in this area, to allow "the remedial tail to wag the substantive dog." Blumrosen, supra note 11, at 1510. As exclusive bargaining representative, Local 12 had the duty to represent fairly all employees, union members and non-members alike. To adopt a narrow interpretation of section 8(b)(1)(A) which would only protect the comprehensive section 7 right of employees to bargain collectively in those cases involving union conduct which encourages or discourages union membership would to a large degree render such right meaningless in the area of union administration of the bargaining agreement.14 Indeed, it is only

Wiresda on the ground that no breach of the union's duty of fair representation had been established, found "no cause for the court to even consider the important and far-reaching question...; whether action which violates a union's duty of fair representation may constitute an unfair labor practice in violation of section 8(b)(1)." 326 F.2d at 180. Judge Friendly based his dissenting opinion upon the finding of an vafair labor practice under section 8(b)(2) and thus did not reach the section 8(b)(1)(A) issue. This.

14 Section 8(b)(1)(A) has been construed broadly to

M Section 8(b)(1)(A) has been construed broadly to encompase a broad range of conduct. E.g., International Ladies Garment Worken Union v. NLRB, 1961, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762; Communications Workers v. NLRB, 1960, 362 U.S. 479, 80 S.Ct. 638, 4 L.Ed.2d 896; Radio Officers v. NLRB, 1954, 347 U.S. 17, 74 S.Ct. 223, 98 L.Ed. 465; NLRB v. United Packinghouse Workers, 5th Cir. 1957, 248 F.2d 745; see United Ass'n of Journeymen v. Borden, 1963, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638.

through the day-to-day administration of individual grievances that employee rights achieved in the negotiated bargaining contract are placed in a definitive context, and through which specific individual claims find a vital means of protection.

Moreover, the Board's recent assertions that the duty of fair representation constitutes an essential element of section 7 employee rights15 are even more convincing in light of the similarity in language between section 7 and section 2 of the Railway Labor Act,16 from which the Supreme Court in Steele perceived congressional intent to impose such duty of fair representation upon the bargaining representative. In that case, the Court reasoned that since the jurisdiction of the Railway Adjustment Board did not encompass disputes between employees and unions, the remedy must necessarily be sought in the courts. Since the National Labor Relations Board has, however, been given jurisdiction over employee-union disputes, the Court's logic in Steele, reinforced by the Board's express desire to assume jurisdiction, further supports our conclusion that unfair representation cases are properly subject to Board jurisdiction. Sig-

¹⁸ Local 1376, International Longshoremens Union, 1964,
¹⁴⁸ N.L.R.B. 897; Automobile Workers Union, 1964, 149
N.L.R.B. 482; Independent Metal Workers Union, 1964, 147
N.L.R.B. 1573; Miranda Fuel Co., 1962, 140 N.L.R.B. 181,
enforcement denied, 2d Cir. 1963, 326 F.2d 272.
¹⁶ Section 2, Fourth of the Railway Labor Act provides

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. 48 Stat. 1187 (1934), 45 U.S.C. § 152, Fourth:

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nificantly, the violation of every other duty imposed by the act, including the general duty to bargain collectively, has been designated an unfair labor practice, and we find no compelling reason to conclude that a breach of the duty of fair representation was intended to represent a single, narrow exception to Board jurisdiction." bicca sit lasvostulos they at law representation constitutes and existing

Recognition of a breach of the union's duty of fair representation as an unfair labor practice will have the necessary effect of bringing such controversies within the primary jurisdiction of the Board, thus requiring some degree of reorientation of current jurisdictional practices. In San Diego Bldg. Trades Council v. Gorman, 1959, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, the Supreme Court established the

A 20 1963 377 U.S. 690 33 E.G. 1423.

Union, 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, reversing, 5th Cir. 1955, 223 F.2d 739, where the Supreme Court in a per curiam opinion reversed a decision by this Court which had concluded that the federal courts were without jurisdiction to enjoin enforcement of a collective bargain-

sweeping doctrine that "when an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." A notable exception to this doctrine of preemption is provided in section 301(a) of the act, however, which brings suits for violation of the bargaining contract within the jurisdiction of the courts. Thus, if the claim of an aggrieved employee is based essentially on breach of contract, even though it might also arguably involve a violation of section 7 or 8, it is established that the courts may entertain the controversy. Humphrey v. Moore, supra; Smith v. Evening News Ass'n, supra note 17. Accordingly, with respect to violations of this hybrid nature, the employee is at liberty to invoke the primary jurisdiction of the Board to assert the unfair labor practice claim or to proceed in the courts on a contract theory. Recognizing a breach of the duty of fair representation as an unfair labor practice should not affect this alternative. Indeed, the Supreme Court in Humphrey v. Moore, supra, has clearly indicated that "even if . . . [a breach of the duty of fair representation] is, or arguably may be, an unfair labor practice," if a violation of the bargaining contract is also involved, the state and federal courts will also have jurisdiction over the controversy, Id. at 344, 84 S.Ct. at 369, 11 L. Ed.2d at

Soldier Sti(a) provides that

Soldier violation of contracts between an exployer and a labor organisation may be brought in any district court at the United States Keving jurisdiction over the parties without respect to the amount in controversy or without regard to the citizenship of the parties. 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

The critical area requiring jurisdictional readjustment will involve those controversies, such as the instant case, where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation.10 In this situation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts.20 San Diego Bldg. Trades Council v. Gorman, supra. We are convinced that this result is desirable for at least two reasons.

First, it will serve to resolve the current jurisdictional uncertainties confronting an individual employee seeking redress for a failure of his union to

10 In addition, numerous cases are likely to arise where employees asserting unfair representation claims which also involve an alleged breach of contract choose to invoke the jurisdiction of the Board rather than that of the courts.

710471, 29 U.S.C. \$ 185(a)

MAlthough Syres v. Oil Workers Union, supra, clearly involved a violation of the bargaining contract in addition to a breach of the duty of fair representation, that decision might be interpreted as establishing the principle that the courts should retain jurisdiction over unfair representation cases even where no breach of the bargaining contract is involved. Syres arose, however, prior to the Supreme Court's comprehensive extension of the preemption doctrine in Gorsson, and well before the Board began to express its intention to assert jurisdiction over unfair representation cases. Thus, at the time of Syres, the employee's sole remedy for a breach of the duty of fair representation lay in the

The Board has at times indicated that under certain circumstances it will rescind the certification of a union shown to have violated its duty of fair representation. See, e.g., Pioneer Bus Co., 1962, 140 N.L.R.B. 54; A. O. Smith Corp., 1967, 119 N.L.R.B. 621; Pittsburg Plate Glass Co., 1965, 111 N.L.R.B. 1210; Hughes Tool Co., 1963, 104 N.L.R.B. 318.

Buch drastic remedy, however, is of little practical benefit to an aggricus individual amployee and would appear clearly inappropriate in numerous controversies, such as the instant case, involving arbitrary union conduct with respect to a small minority of employees.

represent him in good faith. In Local 100, United Ass'n of Journeymen v. Borden, supra note 17, the Supreme Court recently ruled that even though an employee claim is couched in terms of breach of contract, if the claim is based essentially on union interference with "employment relations" it must be first presented to the Board since it may arguably involve an unfair labor practice.21 Accord, Local 207, International Ass'n of Bridge Workers v. Perko, 1963, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646. This extension of the preemption doctrine appears equally applicable to employee claims based essentially on a breach of the duty of fair representation to the extent that these claims often involve union interference with "employment relations." In such situations the aggrieved employee must initially assert his claim before the Board with the bleak prospect of beginning anew in the courts if the Board concludes that the only violation involved in his claim is a breach of the union's duty of fair representation. Recognizing a violation of the duty of fair representation as an unfair labor practice will avoid this jurisdictional predicament of "sending the impecunious plaintiff back to the courts when the Board finds the union's action to have been wholly arbitrary." NLRB v. Miranda Fuel Co., supra, 326 F.2d at 181 (Friendly, J., dissenting).

in the courts, was instructed to initiate an unfair labor practice proceeding before the Board with the prospect of returning to the courts if the Board concluded that the only violation involved in his claim was that of the union's duty of fair representation. See also Humphrey v. Moore, supra, 375 U.S. at 351, 84 S.Ct. at 373, 11 L.Ed.2d at (Goldberg, J., separate opinion), 375 U.S. at 339, 84 S.Ct. at 377, 11 L.Ed.2d at (Harian, J., dissenting).

Secondly, the adequacy of existing judicial remedies afforded individual unfair representation claims has been seriously questioned. Under current practice, the aggrieved employee is not only compelled to bear the substantial expense of an individual lawsuit, but must also face the burden of overcoming the strong judicial presumption of legality of union action in this area. Thus confronted with jurisdictional, monetary and procedural obstacles, the individual employee may well find his right to fair representation as enforced by the courts more theoretical than real.

In light of these considerations, we are convinced that the rights of individual employees to be fairly represented can be more fully achieved within the spirit of the act by recognizing the Board as the appropriate body to meet the challenge of uniformly administering standards of fair representation. Its peculiar expertise with respect to the complexities of the bargaining process, its broad powers of investigation, and most importantly, its power to encourage informal settlements at the regional director level render it better qualified than the necessarily

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improperly indulge in a beavy presumption of regularity of union action similar to the presumption of constitutionality applicable in the area of judicial review of state economic action. Wellington, supra note 11, 67 Yale L.J. at 1399-42; see Murphy, sepre note 11, 30 Mo. L. Rev. at 375-77 Similarly, the failure of the courts to appreciate the necessity for a more limited range of permissible union discretion in the administration state has been critically as an union restriction of individual employee rights. Bunnessen, supra note 11, 61 Might Liker, at 1460-72. See also, Herring, supranote 11, 24 Md. L. Rev. at 146-48 aid o pignage.

the task of formulating and applying uniform standards of fair representation in such manner as to afford adequate protection to employee rights without unduly impeding the collective bargaining process. We have confidence in the competence of the Board to discharge this delicate task of striking a meaningful balance between its primary duty of promoting union-management relations and that of safeguarding the section 7 rights of employees, a task which will entail nothing new to the agency initially designated as the appropriate body to construe and apply the unfair labor practice provisions of the act as well as its representation provisions.

In thus concluding that a breach of the duty of fair representation constitutes an unfair labor practice, we are not unmindful that Title VII of the Civil Rights Act of 1964, effective July 2, 1965, makes it an "unlawful employment practice" for a union to discriminate against "any individual because of his race, color, religion, sex, or national origin" or to cause or attempt to cause an employer to do so, Section 703(c)(1)-(3), 78 Stat. 255 (1964), 42 U.S.C. 2000e-2(c)(1)-(3). Since the claims before us arose fully three years prior to the effective date of Title VII, its pertinent provisions are clearly inapplicable in this controversy. Nevertheless, it is equally clear

Beard jurisdiction in this area may well have the commendable effect of encouraging increased arbitration of unfair representation claims, thus avoiding just such disputes as that involved in this case. Blumrosen, sugra note 11, 61 Mich. L. Rev. at 1514-16.

that had these claims arisen after July 2, 1965, the complainants under our holding today would be at liberty to seek redress under the enforcement provisions of Title VII or to assert unfair labor practice charges before the Board." This problem of overlapping remedies, however, would exist even in the absence of recognition of a breach of the duty of fair representation as an unfair labor practice, for undeniably unfair labor practice charges arising under many provisions of section 8 will also involve union and employer conduct proscribed by Title VII.25 We recognize that while Title VII represents an appreciable addition to the protection afforded employee rights in the specific areas of discrimination covered by the Civil Rights Act, there continues to exist a broad potential range of arbitrary union conduct not specifically covered by Title VII which may also violate the union's duty of fair representation.26 The comprehensive right of an employee to be represented fairly and in good faith by his exclusive bar-

clusive with regard to all claims arising under it.

**We need not pass upon the issue of whether the Board should refrain from asserting jurisdiction over these claims of discrimination covered by Title VII which might also involve an unfair labor practice. See Sherman, supre note 11, 49 Minn. L.Rev. at 804.

**See c.g.; Humphrey v. Moore, supre; NLRB v. Miranda Fuel Co., supre; Union News Co. v. Hildreth, 6th Cir. 1961, 266 F.26 668, aff'd on reneuring, 1963, 315 F.26 548; of. Ferro Railway Express Agency, Inc., 2d Cir. 1961, 296 F.2d 847.

²⁴ Legislative history and specific provisions of the act itself make it apparent that Congress did not intend to establish the enforcement provisions of Title VII as the exclusive remedy in this area. See sections 708, 1103, 78 Stat. 262, 268 (1964), 42 U.S.C.2000e-7, 2000h-3. See also (110 Cong. Rec. 13171 (daily ed. June 12, 1964) where the Senate rejected a proposed amendment which would have had the effect of rendering the remedial provisions of Title VII exclusive with regard to all claims arising under it.

gaining agent clearly encompasses more than freedom from union discrimination based solely upon race, religion, and sex. The mere fact, therefore, that Congress has seen fit to provide specific protection to employees from union and employer discrimination in the area of civil rights in no way detracts from the legal and practical bases of our determination that a breach of the union's duty of fair representation constitutes a violation of section 8(b)(1)(A).

Having thus concluded that petitioner's breach of the duty of fair representation constitutes an unfair labor practice under section 8(a)(1)(A) of the act, we need not consider the Board's additional contentions that such conduct also violated sections 8(b)(2) and 8(b)(3). We also conclude that under the circumstances the Board did not exceed the scope of its remedial powers in ordering petitioner to process the grievances in question through arbitration and to propose to the employer contractual provisions aimed at prohibiting continued racial discrimination in terms and conditions of employment as expressed in the oral agreement of March 1962.

ENFORCEMENT GRANTED.

Adm. Office, U. S. Courts-E. S. Upton Printing Co., N. O., La.

SUPREME COURT OF THE UNITED STATES

No. 114.—OCTOBER TERM, 1966.

Manuel Vaca et al., Petitioners,

Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased. On Writ of Certiorari to the Supreme Court of Missouri.

[February 27, 1967.]

MR. JUSTICE WHITE delivered the opinion of the Court. On February 13, 1962, Benjamin Owens filed this class action against petitioners, as officers and representatives of the National Brotherhood of Packinghouse Workers and of its Kansas City Local No. 12 (the Union), in the Circuit Court of Jackson County, Missouri. Owens, a Union member, alleged that he had been discharged from his employment at Swift & Company's (Swift) Kansas City Meat Packing Plant in violation of the collective bargaining agreement then in force between Swift and the Union, and that the Union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift to arbitration under the fifth step of the bargaining agreement's grievance procedures.

Petitioners' answer included the defense that the Missouri courts lacked jurisdiction because the gravamen of Owens' suit was "arguably and basically" an unfair labor practice under § 8 (b) of the National Labor Relations Act, as amended, 29 U. S. C. § 158 (b); within the exclusive jurisdiction of the National Labor Relations

¹ Now known as the National Brotherhood of Packinghouse & Dairy Workers.

Board (NLRB). After a jury trial, a verdict was returned awarding Owens \$7,000 compensatory and \$3,300 punitive damages. The trial judge set aside the verdict and entered judgment for petitioners on the ground that the NLRB had exclusive jurisdiction over this controversy, and the Kansas City Court of Appeals affirmed. The Supreme Court of Missouri reversed and directed reinstatement of the jury's verdict, relying on this Court's decisions in International Assn. of Machinists v. Gonzales, 356 U.S. 617, and in Automobile Workers v. Russell, 356 U. S. 434: 397 S. W. 2d 658. During the appeal, Owens died and respondent, the administrator of Owens' estate, was substituted. We granted certiorari to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal labor law. 384 U.S. 969. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Swift, and the United States have filed amicus briefs supporting petitioners. Although we conclude that state courts have jurisdiction in this type of case, we hold that federal law governs, that the governing federal standards were not applied here, and that the judgment of the Supreme Court of Missouri must accordingly be reversed.

I.

In mid-1959, Owens, a long-time high blood pressure patient, became sick and entered a hospital on sick leave from his employment with Swift. After a long rest during which his weight and blood pressure were reduced, Owens was certified by his family physician as fit to resume his heavy work in the packing plant. However,

² Punitive damages were reduced to \$3,000, the amount claimed by Owens in his complaint.

Swift's company doctor examined Owens upon his return and concluded that his blood pressure was too high to permit reinstatement. After securing a second authorization from another outside doctor, Owens returned to the plant, and a nurse permitted him to resume work on January 6, 1960. However, on January 8, when the doctor discovered Owens' return, he was permanently discharged on the ground of poor health.

Armed with his medical evidence of fitness, Owens then sought the Union's help in securing reinstatement, and a grievance was filed with Swift on his behalf. By mid-November 1960, the grievance had been processed through the third and into the fourth step of the grievance procedure established by the collective bargaining agreement. Swift adhered to its position that Owens' poor health justified his discharge, rejecting numerous medical reports of reduced blood pressure proffered by Owens and by the Union. Swift claimed that these reports were not based upon sufficiently thorough medical tests.

On February 6, 1961, the Union sent Owens to a new doctor at Union expense "to see if we could get some better medical evidence so that we could go to arbitration with his case." R., at 182. This examination did not support Owens' position. When the Union received the report, its executive board voted not to take the Owens grievance to arbitration because of insufficient

The agreement created a five-step procedure for the handling of grievances. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to Swift's department foreman, and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the Union. Step four is a meeting between Swift's general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator.

medical evidence. Union officers suggested to Owens that he accept Swift's offer of referral to a rehabilitation center, and the grievance was suspended for that purpose. Owens rejected this alternative and demanded that the Union take his grievance to arbitration, but the Union refused. With his contractual remedies thus stalled at the fourth step, Owens brought this suit. The grievance was finally dismissed by the Union and Swift shortly before trial began in June 1964.

In his charge to the jury, the trial judge instructed that petitioners would be liable if Swift had wrongfully discharged Owens and if the Union had "arbitrarily... and without just cause or excuse... refused" to press Owens' grievance to arbitration. Punitive damages could also be awarded, the trial judge charged, if the Union's conduct was "willful, wanton and malicious." However, the jury must return a verdict for the defendants, the judge instructed, "if you find and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff." R., at 259-261. The jury then returned the general verdict for Owens which eventually was reinstated by the Missouri Supreme Court.

П.

Petitioners challenge the jurisdiction of the Missouri courts on the ground that the alleged conduct of the Union was arguably an unfair labor practice and within the exclusive jurisdiction of the NLRB. Petitioners rely on Miranda Puel Co., 140 N. L. R. B. 181 (1962), enforcement denied, 326 F. 2d 172 (C. A. 2d Cir. 1963), where a sharply divided Board held for the first time

No notice of the dismissal was given to Owens, who by that time had filed a second suit against Swift for breach of contract. The suit against Swift is still pending in a pretrial stage.

that a union's breach of its statutory duty of fair representation violates N. L. R. A. § 8 (b), as amended. With the NLRB's adoption of *Miranda Fuel*, petitioners argue, the broad pre-emption doctrine defined in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, becomes applicable. For the reasons which follow, we reject this argument.

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see Ford Motor Co. v. Huffman. 345 U. S. 330; Syres v. Oil Workers International Union. 350 U. S. 892, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U.S. 335. The statutory duty of fair representation. was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N. R. R., 323 U. S. 192: Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, and was soon extended to unions certified under the N. L. R. A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S., at 342. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. E. g., Ford Motor Co. v. Huffman, supra.

Although N. L. R. A. § 8 (b) was enacted in 1947, the NLRB did not until Miranda Fuel interpret a breach of

a union's duty of fair representation as an unfair labor practice: In Miranda Fael, the Board's majority held that N. L. R. A. § 7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and "that Section 8 (b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 N. L. R. B., at 185. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8 (a) (1), and that the employer and the union may violate §§ 8 (a)(3) and 8 (b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employ? ment status of an employee." s Id. at 186.

The Board's Miranda Fuel decision was denied enforcement by a divided Second Circuit, 326 F. 2d 172 (1963). However, in Local 12, United Rubber Workers v. NLRB, No. 22239 (Nov. 9, 1966), the Fifth Circuit upheld the Board's Miranda Fuel doctrine in an opinion suggesting that the Board's approach will pre-empt judicial cognizance of some fair representation duty suits. In light of these developments, petitioners argue that Owens' state court action was based upon Union conduct that is arguably prescribed by N. L. R. A. § 8 (b), was potentially enforceable by the NLRB, and was therefore pre-empted under the Garmon line of decisions.

^{*}Ree also Cargo Handlers, Inc., 150 N. L. R. B. No. 17; Local 12, United Rubber Workers, 150 N. L. R. B. 312, enforced, No. 22239 (C. A. 5th Cir. Nov. 9, 1966); Maremont Corp., 149 N. L. R. B. 482; Galueston Maritime Assn., Inc., 148 N. L. R. B. 897; Hughes Tool Co., 147 N. L. R. B. 1573.

A. In Garmon, this Court recognized that the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act necessarily imply that potentially conflicting "rules of law, of remedy, and of administration" cannot be permitted to operate. 359 U. S., at 242. In enacting the National Labor Relations Act and later the Labor Management Relations Act,

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters Union, 346 U. S. 485, 490 491.

Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving "activity [which] is arguably subject to § 7 or § 8 of the Act." San Diego Building Trades Council v. Garmon, 359 U. S., at 245.

This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Section 303 of the Labor Management Relations Act, 29 U. S. C. § 187,

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expressly permits anyone injured by a violation of N. L. R. A. § 8 (b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; § 301 of that Act, 29 U. S. C. § 185, permits suits for breach of a collective bargaining agreement egardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board, see Smith v. Evening News Assn., 371 U. S. 195; and N. L. R. A. § 14, as amended by Title VII, § 701 (a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U. S. C. § 164 (c), permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." Compare Guss v. Utah Labor Relations Board, 353 U.S. 1.

In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act." San Diego Building Trades Council v. Garmon, 359 U.S., at 243-244. See, g. g., Linn v. United Plant Guard Workers, 383 U.S. 53. (libel); United Automobile Workers v. Russell, 356 U. S. 634 (violence); International Assn. of Machinists v. Gonsales, 356 U.S. 617 (wrongful expulsion from union membership); Electrical Workers v. Wisconsin Employment Relations Board, 315 U. S. 740 (mass picketing). See also Hanna Mining Co. v. Marine Engineers Beneficial Assn., 382 U. S. 181. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given

class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.

A primary justification for the pre-emption doctrinethe need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation. The doctrine was judicially developed in Steele and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L. M. R. A. Moreover, when the Board declared in Miranda Fuel that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See 140 N. L. R. B., at 184-186. Finally, as the dissenting Board members in Miranda Fuel have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts,

^e See Ford Motor Co. v. Huffman, 345 U. S. 330, 332, n. 4. In Huffman, the NLRB submitted an amicus brief stating that it had not assumed pre-emptive jurisdiction over fair representation duty issues. Mem. for the NLRB, Nos. 193 and 194, Oct. Term, 1952. In Syres v. Oil Workers International Union, 350 U. S. 892, the Court reversed the dismissal of a suit which claimed breach of the duty of fair representation despite express reliance by one respondent on exclusive NLRB jurisdiction. Brief for Resp. Gulf Oil Corp., No. 390, Oct. Term, 1955.

which have been engaged in this type of review since the Steele decision.'

In addition to the above considerations, the unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases. The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N. L. R. A. § 1, as amended, 29 U. S. C. § 151. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. See, e. g., I. I. Case Co. v. N. L. R. B., 321 U. S. 332. This Court recognized in Steele that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-199. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the government urge, that the courts are pre-empted by the NLRB's Miranda Fuel decision of this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General

See Hughes Tool Co., 147 N. L. R. B. 1873, 1589-1590 (Chairman McCulloch and Member Fanning; dissenting in part).

Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. See United Electrical Contractors Assn. v. Ordman, No. 29879, C. A. 2d Cir., Sept. 23, 1966, cert. denied, 35 U. S. L. Week 3243. (Jan. 17, 1967). The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N. L. R. A. § 8 (b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

B. There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L. M. R. A. § 301 charging an employer with a breach of contract. To illustrate, let us assume a collective bargaining agreement that limits discharges to those for good cause and that contains no grievance, arbitration

The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. See N. L. R. A. § 10 (c), as amended, 29 U. S. C. § 160 (c); Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial." See Administrative Decision of the General Counsel, Case No. K-610, Aug. 13, 1956, in CCH N. L. R. B. Decisions, 1956–1957, at § 54,059.

or other provisions purporting to restrict access to the courts. If an employee is discharged without cause, either the union or the employee may sue the employer under L. M. R. A. § 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to § 301 suits. Smith v. Evening News Assn., 371 U. S. 195.

The rule is the same with regard to pre-emption where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract claims. If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compet arbitration of the employee's grievance; the adjudication of the claim by the arbitrator; or a suit to enforce the resulting arbitration award. See, e. g., Steelworkers v. American Mfg. Co., 363 U. S. 564.

However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have

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If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See Republic Steel Corp. v. Meddox, 379 U. S. 650, 657-658; 6A Corbin, Contracts § 1436 (1962).

¹⁶ Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See Retail Clerks v. Lion Dry Goods, Inc., 341 R. 2d 715, cert. denied, 382 U. S. 839.

been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breachof-contract claim despite his failure to secure relief through the contractual remedial procedures.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries Inc. v. Bakery Workers, 370 U. S. 254, 260–263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff

has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. Richardson v. Texas & N. O. R. R., 242 F. 2d 230. 235-236 (C. A. 5th Cir.).

For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." We may assume for present purposes that

¹³ Accord, Hiller v. Liquor Salesmen's Union, 338 F. 2d 778 (C. A. 2d Cir.); Hardcastle v. Western Greyhound Lines, 303 F. 2d 182 (C. A. 9th Cir.), cart. denied, 341 U. B. 920; Fiore v. Associated Transport, Inc., 255 F. Supp. 596; Bieski v. Rastern Automobile Forwarding Co., 231 F. Supp. 710, aff'd, 354 F. 2d 414 (C. A. 3d Cir.); Ostrofsky v. United Steelworkers, 171 F. Supp. 782, aff'd

such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his \$ 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a \$301 suit, and the jurisdiction of the courts is not pre-empted under the Garmon principle. This, at the very least, is the holding of Humphrey v. Moore with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against the Union itself.

For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the

per curiam, 273 F. 2d 614 (C. A. 4th Cir.), cert. denied, 363 U. S. 849; Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A. 2d 88.

union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong slight deterrence, indeed to future union misconduct-or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong.12 Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudieste whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

It follows from the above that the Missouri courts had jurisdiction in this case. Of course, it is quite another

¹³ Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not "participate" in the Union's unfair labor practice, the Board would have no jurisdiction to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a \$ 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate.

problem to determine what remedies may be available against the Union if a breach of duty is proven. See Part IV, infra. But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the Garmon pre-emption doctrine inapplicable.

III.

Petitioners contend, as they did in their motion for judgment notwithstanding the jury's verdict, that Owens failed to prove that the Union breached its duty of fair representation in its handling of Owens' grievance. Petitioners also argue that the Supreme Court of Missouri, in rejecting this contention, applied a standard that is inconsistent with governing principles of federal law with respect to the Union's duty to an individual employee in its processing of grievances under the collective bargaining agreement with Swift. We agree with both contentions.

A.

In holding that the evidence at trial supported the jury's verdict in favor of Owens, the Missouri Supreme Court stated:

"The essential issue submitted to the jury was whether the union . . . arbitrarily . . . refused to carry said grievance . . . through the fifth step.

"We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his reg-

ular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he hadactually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants." 397 S. W. 2d, at 665.

Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Humphrey v. Moore, supra; Ford Motor Co. v. Huffman, supra. There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1482–1501 (1963); Comment, Federal Protection of Individual Rights under Labor Contracts, 73 Yale L. J. 1215 (1964). Some have suggested that every individual employee should have the right to have his grievance

taken to arbitration.¹³ Others have urged that the Union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.¹⁴

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L. M. R. A. § 203 (d), 29 U. S. C. § 173 (d), Congress declared that "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and timeconsuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be

¹³ See Donnelly v. United Fruit Co., 40 N. J. 61, 190 A. 2d 825; 1954 Report of Committee on Improvement of Administration of Union-Management Agreements, Individual Grievances, 50 Nw. U. L. Rev. 143 (1955); Murphy, The Duty of Fair Representation under Taft-Hartley, 30 Mo. L. Rev. 373, 389 (1965); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N. Y. U. L. Rev. 362 (1962).

¹⁶ See Sheremet v. Chrysler Corp., 372 Mich. 626, 127 N. W. 2d 313; Wyls, Labor Arbitration and the Concept of Exclusive Representation, 7 B. C. Ind. & Com. L. Rev. 783 (1966).

treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration.15 This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. See NLRB v. Acme Ind. Co., - U.S. --: Ross, Distressed Grievance Procedures and Their Rehabilitation, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators 104 (1963). It can well be doubted whether the parties to collective bargaining

to keep the number of arbitrated grievances to a minimum. An officer of the National Union testified in this case that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration. And the AFL-CIO's omicus brief reveals similar performances at General Motors Company and United States Steel Corporation, two of the Nation's largest unionized employers: less than .06% of all written grievances filed during a recent period at General Motors required arbitration, while only 5.0% of the grievances processed beyond the first step at United States Steel were decided by an arbitrator.

agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L. M. R. A. § 203 (d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

For these same reasons, the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious. the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by providing him with recourse against both employer (in a § 301 suit) and union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Therefore, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged. technique was to the Hanne was w

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Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance. The evidence revealed that the Union diligently supervised the grievance into the fourth step of the bargaining agreement's procedure, with the Union's business representative serving as Owens' advocate throughout these steps. When Swift refused to reinstate Owens on the basis of his medical reports indicating reduced blood pressure, the Union sent him to another doctor of his own choice, at Union expense, in an attempt to amass persuasive medical evidence of Owens' fitness for work When this examination proved unfavorable, the Union concluded that it could not establish a wrongful discharge. It then encouraged Swift to find light work for Owens at the plant. When this effort failed, the Union determined that arbitration would be fruitless and suggested to Owens that he accept Swift's offer to send him to a heart association for rehabilitation. At this point, Owens' grievance was suspended in the fourth step in the hope that he might be rehabilitated.

In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See Humphrey v. Moore, 375 U. S. 335, 349-350; Ford Motor Co. v. Huffman, 345 U. S. 330, 337-330. In a case such as this, when Gwens supplied the Union with medical

evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner. See Cox, Rights under a Labor Agreement, 69 Harv. L. Rev., at 632-634. But here the Union processed the grievance into the fourth step, attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith.16 Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here.

IV.

In our opinion, there is another important reason why the judgment of the Missouri Supreme Court cannot

is Owens did allege and testify that petitioner Vaca, President of the Kansas City local, demanded \$300 in expenses before the Union would take the grievance to arbitration, a charge which all the petitioners vigorously denied at trial. Under the collective bargaining agreement, the local union had no power to invoke arbitration. See Note 3, supra. Moreover, the Union's decision to send Owens to another doctor at Union expense occurred after Vaca's alleged demand, and the ultimate decision not to invoke arbitration came later still. Thus, even if the jury believed Owens' controverted testimony, we do not think that this incident would establish a breach of duty by the Union.

stand. Owens' suit against the Union was grounded on his claim that Swift had discharged him in violation of the applicable collective bargaining agreement. In his complaint, Owens alleged "that, as a direct result of said wrongful breach of said contract, by employer.

Plaintiff was damaged in the sum of Six Thousand, Five Hundred (\$6,500.00) Dollars per year, continuing until the date of trial." For the Union's role in "preventing Plaintiff from completely exhausting administrative remedies," Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of \$3,000. R., at 6. We hold that such damages are not recoverable from the Union in the circumstances of this case.

The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. In this case, the employee's complaint was that the Union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement. But the damages sought by Owens were primarily those suffered because of the employer's alleged breach of contract. Assuming for the moment that Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the Union's failure to resort to arbitration, compare Republic Steel Corp. v. Maddax, 379 U. S. 650, with Smith v. Evening News Assn., 371 U.S. 195, and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay. See pp. 13-14, supra. The difficulty lies in fashioning an appropriate scheme of remedies.

Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and

the union to arbitrate the underlying grievance." It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.

A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of .contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in Humphrey v. Moore, supra. It could be a real hardship on the union to pay

¹⁷ Obviously, arbitration is an appropriate remedy only when the parties have created such a procedure in the collective bargaining agreement.

these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages.¹⁸

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage

award was improper.

Reversed.

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We are not dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract. In cases of that sort where the union's conduct is found to be an unfair labor practice, the NLRB has found an unfair labor practice by the employer, too, and has held the union and the employer jointly and severally liable for any back pay found owing to the particular employee who was the subject of their joint discrimination. E. g., Imparato Stevedoring Corp., 113 N. L. R. B. 883 (1955); Squirt Distrib. Co., 92 N. L. R. B. 1667 (1951); H. M. Neuman, 85 N. L. R. B. 725 (1949). Even if this approach would be appropriate for analogous § 301 and breach-of-duty suits, it is not applicable here. Since the Union played no part in Swift's alleged breach of contract and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted.

SUPREME COURT OF THE UNITED STATES

No. 114.—OCTOBER TERM, 1966.

Manuel Vaca et al., Petitioners,

Niles Sipes, Administrator of the Estate of Benjamin owens, Jr., Deceased. On Writ of Certiorari to the Supreme Court of Missouri.

[February 27, 1967.]

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and Mrs. JUSTICE HARLAN join, concurring in the result.

1. In my view, a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdiction of the NLRB. It is a charge of unfair labor practice. See Miranda Fuel Co., 140 N. L. R. B. 181 (1962); Local 12, United Rubber Workers, 150 N. L. R. B. 312, enforced, No. 22239 (C. A. 5th Cir., Nov. 9, 1966). As is the case with most other

The opinion by Judge Thornberry for the Fifth Circuit supports the views expressed herein. See also Cox, The Duty of Fair Representation, 2 Villanova L. Rev. 181, 172-173 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327 (1958).

This decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. NLRB v. Miranda Fuel Co., 326 F. 2d 172 (C. A. 2d Cir. 1963). Only one judge, Judge Medina, took the position that the NLRB had incorrectly held violation of the duty of fair representation to be an unfair labor practice. As an alternative ground for decision, he held that the NLRB had not had sufficient evidence to support its finding of breach of the duty. Judge Lumbard agreed with this latter holding, and explicitly did not reach the question whether breach of the duty is an unfair labor practice. Judge, Friendly difference. He would have affirmed the NLRB both on the sufficiency of the evidence and on the holding that breach of the duty of fair representation is an unfair labor practice as to which the NLRB can give relief.

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unfair labor practices, the Board's jurisdiction is preemptive. Garner v. Teamsters Union, 346 U. S. 485 (1953); Guss v. Utah Labor Board, 353 U. S. 1 (1957); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Local 438, Constr. Laborers v. Curry, 371 U. S. 542 (1963); Plumbers' Union v. Borden, 373 U. S. 690 (1963), Iron Workers v. Perko, 373 U.S. 701 (1963); Liner v. Jafco, Inc., 375 U. S. 301 (1964). Cf. Woody v. Sterling Alum. Prods. Inc., No. 18,083 (C. A. 8th Cir., Sept. 2, 1966, petition for certiorari pending, No. 946, O. T. 1966). There is no basis for failure to apply the pre-emption principles in the present case, and, as I shall discuss, strong reason for its application. The relationship between the union and the individual employee with respect to the processing of claims to employment rights under the collective bargaining agreement is fundamental to the design and operation of federal labor law. It is not "merely peripheral," as the Court's opinion states. It "presents difficult problems of definition of status, problems which we have held are precisely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." Iron Workers v. Perko, supra, 373 U. S., at 706. Accordingly, the judgment of the Supreme Court of Missouri should be reversed and the complaint dismissed for this reason and on this basis. I agree, however, that if it were assumed that jurisdiction of the subject matter exists, the judgment would still have to be reversed because of the use by the Missouri court of an improper standard for measuring the union's duty, and the absence of evidence to establish that the union refused further to process Owens' grievance because of bad faith or arbitrarily.

2. I regret the elaborate discussion in the Court's opinion of problems which are irrelevant. This is not an action by the employee against the employer, and the discussion of the requisites of such an action is, in my

judgment, unnecessary. The Court argues that the employee could sue the employer under NLRB \$ 301; and that to maintain such an action the employee would have to show that he has exhausted his remedies under the collective bargaining agreement, or alternatively that he was prevented from doing so because the union breached its duty to him by failure completely to process his claim. That may be; or maybe all he would have to show to maintain an action against the employer for wrongful discharge is that he demanded that the union process his claim to exhaustion of available remedies, and that it refused to do so." I see no need for the Court to pass upon that question, which is not presented here, and which, with all respect, lends no support to the Court's argument. The Court seems to use its discussion of the employee-employer litigation as somehow analogous to or supportive of its conclusion that the employee may maintain a court action against the union. But I do not believe that this follows. I agree that the NLRB's unfair labor practice jurisdiction does not preclude an action under § 301 against the employer for wrongful discharge from employment. Smith v. Evening News Assn., 371 U. S. 195 (1962). Therefore, Owens might maintain an action against his employer in the present case. This

Cf. my Brother Black's dissenting opinion in this case. Cf. also Brown v. Sterling Alum. Prods. Inc., 365 F. 2d 651, 656-657 (C. A. 8th Cir. 1966, petition for certigrari pending, No. 946, O. F. 1966). Republic Steel Corp. v. Maddaz, 379 U. S. 650 (1965), does not pass upon the issue. The Court states that "To leave the employee remediless" when the union wrongfully refuses to process his grievance, "would... be a great injustice." I do not believe the Court relieves this injustice to any great extent by requiring the employee to prove an unfair labor practice as a pre-requisite to judicial relief for the employer's breach of contract. Nor do I understand how giving the employee a cause of action against the union is an appropriate way to remedy the injustice which would exist if the union were allowed to forcelose relief against the employer.

would be an action to enforce the collective bargaining agreement, and Congress has authorized the courts to entertain actions of this type. But his claim against the union is quite different in character, as the Court itself recognizes. The Court holds—and I think correctly if the issue is to be reached—that the union could not be required to pay damages measured by the breach of the employment contract, because it was not the union but the employer that breached the contract. I agree; but I suggest that this reveals the point for which I contend: that the employee's claim against the union is not a claim under the collective bargaining agreement, but a claim that the union has breached its statutory duty of fair representation. This claim, I submit, is a claim of unfair labor practice and it is within the exclusive jurisdiction of the NLRB. The Court agrees that "one of the available remedies [obtainable, the Court says, by court action] when a breach of the Union's duty is proved" is "an order compelling arbitration." This is precisely and uniquely the kind of order which is within the province of the Board. Beyond this, the Court is exceedingly vague as to remedy: "appropriate damages or other. equitable relief" are suggested as possible remedies, apparently when arbitration is not available. Damages against the union, the Court admonishes, should be gauged "according to the damage caused by its fault"i. e., the failure to exhaust remedies for the grievance. The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to-force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly to represent all employees in the unit. This is an unfair labor practice, and should be treated as such.

The Court argues that since the employee suing the employer for breach of the employment contract would have to show ex-

3. If we look beyond logic and precedent to the policy of the labor relations design which Congress has provided, court jurisdiction of this type of action seems anomalous and ill-advised. We are not dealing here with the interpretation of a contract or with an alleged. breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court-regrettably, in my opinion-ventures to state judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board and which is well within the pre-emption doctrine that this Court has prudently stated. See cases cited, supra, especially the Perko and Borden cases, the facts of which strongly parallel the situation in this case. See also Linn

haustion of remedies under the contract, and since he would for this purpose have to show his demand on the union and, according to the Court, its wrongful failure to prosecute his grievance, the union could be joined as a party defendant; and since the union could be joined in such a suit; it may be sued independently of the employer. But this is a non sequitur. As the Court itself insists, the suit against the union is not for breach of the employment contract, but for violation of the duty fairly to represent the employee. This is an entirely different matter. It is a breach of statutory duty—an unfair labor practice—and not a breach of the employment contract.

In a variety of contexts the NLRB concerns itself with the substantive bargaining behavior of the parties. For example:

(a) the duty to bargain in good faith, see, e. g., Fibreboard Corp. v. Labor Board, 379 U. S. 203 (1964); (b) jurisdictional disputes, see, e. g., Labor Board v. Radio Engineers, 364 U. S. 573 (1961); (c) secondary boycotts and hot cargo clauses, see, e. g., Orange Belt District Council of Painters No. 48 v. NLRB, 328 F. 2d 534 (C. A. D. C. Cir. 1964).

v. Plant Guard Workers, 383 U. S. 53, 72 (1966) (dissenting opinion). The nuances of union-employee and union-employer relationship are infinite and consequential, particularly when the issue is as amorphous as whether the union acted "in bad faith or arbitrarily" which the Court states as the standard applicable here. In all reason and in all good judgment, this jurisdiction should be left with the Board and not be placed in the courts, especially with the complex and necessarily confusing guidebook that the Court now publishes.

Accordingly, I join the judgment of reversal, but on

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the basis stated.

SUPREME COURT OF THE UNITED STATES

No. 114.—OCTOBER TERM, 1966.

Manuel Vaca et al.,
Petitioners,

nadayah ayu kili sa

Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased. On Writ of Certiorari to the Supreme Court of Missouri.

well thinks assessed that

[February 27, 1967.]

MR. JUSTICE BLACK, dissenting.

The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer. This result follows from the Court's announcement in this case, involving an employee's suit against his union, of a new rule to govern an employee's suit against his employer. The rule is that before an employee can sue his employer under § 301 of the L. M. R. A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory or . . . bad faith" conduct on the part of his union. With this new rule and its result, I cannot agree.

The Court recognizes, as it must, that the jury in this case found at least that Benjamin Owens was fit for work, that his grievance against Swift was meritorious, and that Swift breached the collective bargaining agreement when it wrongfully discharged him. The Court also notes in passing that Owens has a separate action for breach of contract pending against Swift in the state courts. And

in Part IV of its opinion, the Court vigorously insists that "there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay." that the "employee should have no difficulty recovering these damages from the employer" for his "unrelated breach of contract," and that "the employee [is] assured of direct recovery from the employer." But this reassurance in Part IV gives no comfort to Owens, for Part IV is based on the assumption that the union breached its duty to Owens, an assumption which, in Part III of its opinion, the Court finds unsupported by the facts of this case. What this all means, though the Court does not expressly say it, is that Owens will be no more successful in his pending breach-of-centract action against Swift than he is here in his suit against the union. For the Court makes it clear "that the question of whether a union has breached its duty of fair representation will . . . be a critical issue in a suit under L. M. R. A. § 301." that "the wrongfully discharged employee may bring an action against his employer" only if he "can prove that the union . . . breached its duty of fair representation in its handling of the employee's grievance," and "that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union." Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens, who now has obtained a judicial determination that he was wrongfully discharged, is left remediless, and Swift, having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one lots of difference, as far as the "unrelated breach-of-centract" by Swift is concerned,

whether the union's conduct is wrongful or rightful. Neither precedent nor logic support the Court's new announcement that it does.

Certainly, nothing in Republic Steel Corp. v. Maddoz, 379 U. S. 650, supports this new rule. That was a case where the aggrieved employee attempted to "completely sidestep available grievance procedures in favor of a lawsuit." Id., at 653. Noting that "it cannot be said . . . that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," ibid., the Court there held that the employee "must attempt use of the contract grievance procedure," id., at 652, and "must afford the union the opportunity to act on his behalf," id., at 658. I dissented on the firm belief that an employee should be free to litigate his own lawsuit with his own lawyer in a court before a jury, rather than being forced to entrust his claim to a union which, even if it did agree to press it, would be required to submit it to arbitration. And even if, as the Court implied, "the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement and delay which necessarily accompanies the union's refusal to press his claim," id., at 669, I could find no threat. to peaceful labor relations or to the union's prestige in allowing an employee to bypass completely contractual remedies in favor of a traditional breach-of-contract lawsuit for backpay or wage substitutes. Here, of course, Benjamin Owens did not "completely sidestep available grievance procedures in favor of a lawsuit." With complete respect for the union's authority and deference to the contract grievance procedures, he not only gave the union a chance to act on his behalf, but in every way possible tried to convince it that his claim was meritorious and should be carried through the fifth step to

arbitration. In short, he did everything the Court's opinion in Maddox said he should do, and yet now the

Court says so much is not enough.

In Maddox, I noted that the "cases really in point are those which involved agreements governed by the Railway Labor Act and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653; Moore v. Illinois Central R. Co., 312 U. S. 630." 379 U. S., at 666. I also observed that the Court's decision in Maddox "raised the overruling axe so high [over those cases] that its falling is just about as certain as the changing of the seasons." Id., at 667. In the latter observation I was mistaken. The Court has this Term, in Walker v. Southern R. Co., - U. S. -. refused to overrule in light of Maddox such cases as Moore and Koppal. Noting the long delays attendant upon exhausting administrative remedies under the Railway Labor Act, the Court based this refusal on "the contrast between the administrative remedy" available to. Maddox and that available to Walker. If, as the Court suggested, the availability of an administrative remedy determines whether an employee can sue without first exhausting it, can there be any doubt that Owens who had no administrative remedy should be as free to sue as Walker who had a slow one? Unlike Maddox, Owens attempted to implement the contract grievance procedures and found them inadequate. Today's decision. following in the wake of Walker v. Southern R. Co. merely perpetuates an unfortunate anomaly created by Maddoz in the law of labor relations.

The sule announced in Maddox, I thought, was a "brainchild" of the Court's recent preference for arbitration. But I am unable to subscribe any such genesia to today's rule, for arbitration is precisely what Owens

sought and preferred. Today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated. Fearing that arbitrators would be overworked, the Court allows unions unilaterally to determine not to take a grievance to arbitration—the first step in the contract grievance procedure at which the claim would be presented to an impartial third party as long as the union decisions are neither "arbitrary" nor "in bad faith." The Court derives this standard of conduct from a long line of cases holding that "a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." What the Court overlooks is that those cases laid down this standard in the context of situations where the employee's sole or fundamental complaint was against the union. There was not the slightest hint in those cases that the same standard would apply where the employee's primary complaint was against his employer for breach of contract and where he only incidentally contended that the union's conduct prevented the adjudication, by either court or arbitrator, of the underlying grievance. If the Court here were satisfied with merely holding that in this situation the employee cannot recover damages from the union unless the union breached its duty of fair representation, then it would be one thing to say that the union did not do so in making a good-faith decision not to take the employee's grievance to arbitration. But if, as the Court goes on to hold, the employee cannot sue his employer for breach of contract unless his failure to exhaust contractual remedies is due to the union's breach of its duty of fair representation, then I am quite unwilling to say that the union's refusal to exhaust such remedies however nonarbitrary does not amount to a breach of its duty. Either the employee should be able to sue his employer.

for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

And it should be clear that the Court's opinion goes much further than simply holding that an employee has no absolute right to have the union take his grievance to arbitration. Here, of course, the union supervised the grievance through the fourth step of the contract machinery and dropped it just prior to arbitration on its belief that the outcome of arbitration would be unfavorable. But limited only by the standard of arbitrariness, there was clearly no need for the union to go that far. Suppose, for instance, the union had a rule that it would not prosecute a grievance even to the first step unless the grievance were filed by the employee within 24 hours after it arose. Pursuant to this rule, the union might completely refuse to prosecute a grievance filed several days late. Thus, the employee, no matter how meritorious his grievance, would get absolutely nowhere. And unless he could prove that the union's rule was arbitrary (a standard which no one can define), the employee would get absolutely no consideration of the merits of his grievance—not by a jury, nor by an arbitrator, nor by the employer, nor by the union. The Court suggests three reasons for giving the union this almost unlimited discretion to . deprive injured employees of all remedies for breach of contract. The first is that "frivolous grievances" will be ended prior to time-consuming and costly arbitration. But here no one, not even the union, suggests that Benjamin Owens' grievance was frivilous. The union decided not to take it to arbitration simply because

the union doubted the chance of success. Even if this was a good-faith doubt. I think the union had the duty to present this contested but serious claim to the arbitrator whose very function is to decide such claims on the basis of what he believes to be right. Second, the Court says that allowing the union to settle grievances prior to arbitration will assure consistent treatment of "major problem areas in interpretation of collective bargaining contract." But can it be argued that whether Owens was "fit to work" presents a major problem in the interpretation of the collective bargaining agreement? The problem here was one of interpreting medical reports, not a collective bargaining agreement, and of evalusting other evidence of Owens' physical condition. I doubt whether consistency is either possible or desirable in determining whether a particular employee is able to perform a particular job. Finally, the Court suggests that its decision "furthers the interests of the union as statutory agent." I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its "interests." I simply fail to see how the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf.

Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted "arbitrarily or in bad faith." The Court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. Must the employee prove that the union in fact acted arbi-

trarily, or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration? Must the employee join the union in his \$ 301 suit against the employer, or must he join the employer in his unfair representation suit against the union? However these questions are answered, today's decision; requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, while giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement was done part of the day sattives and other and than soft percentage section of the

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